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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

SERENE G. SHAPER,
Petitioner,

v.

ROGER W. TRACY,
Tax Commissioner of Ohio,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Ohio

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State violates the dormant Commerce Clause by taxing the interest income received on out-of-state municipal bonds while exempting interest received from in-state municipal bonds.

2. Whether a State's manipulation of its two-track (prospective declaratory relief/retrospective refund claim) tax challenge procedure to preclude a taxpayer from obtaining highest state court hearing and adjudication of her constitutional challenge to a facially invalid state income tax provision violates due process.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The August 6, 1993 Determination of the State of Ohio Department of Taxation, Refund Claim No. IT-6832, has not been officially reported and is set out in Appendix D at 8a.

The January 20, 1995 Decision and Order of the Ohio Board of Tax Appeals, Case No. 93-X-1032, has not been officially reported and is set out in Appendix C at 3a.

The August 7, 1996 Decision of the Supreme Court of Ohio affirming the decision of the Ohio Board of Tax Appeals is reported at 76 Ohio St.3d 241, 667 N.E.2d 368 (1996), and is set out in Appendix B at 2a.

The October 2, 1996 Order of the Supreme Court of Ohio denying reconsideration is reported at 76 Ohio St.3d 1497, 670 N.E.2d 243 (1996), and is set out in Appendix A at 1a.

JURISDICTION

This is a Petition for a Writ of Certiorari from a decision of the Supreme Court of Ohio affirming the Decision of the Ohio Board of Tax Appeals to deny Petitioner's Ohio income tax refund claim. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, provides:

> The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. U.S.C.A. Const. Art. I § 8, cl. 3.

The Due Process Clause of the United States Constitution, Amendment XIV, provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S.C.A. Const. Amendment XIV.

Ohio R.C. § 5747.01(A)(1) provides, in pertinent part:

> § 5747.01 Definitions. . .
>
> As used in this chapter:

(A) "Adjusted gross income" means adjusted gross income as defined and used in the Internal Revenue Code, adjusted as follows:

(1) Add interest or dividends on obligations or securities of any state or of any political subdivision or authority of any state, other than this state and its subdivisions and authorities; . . . Ohio R.C. § 5747.01 (1)(1).

Ohio R.C. § 5709.76 provides, in pertinent part:

§ 5709.76 Exemption of public obligations

(A) All of the following are exempt from taxes levied by the state and its subdivisions:

(1) Public obligations;

(2) Interest or interest equivalent on public obligations and on purchase obligations;

(3) The transfer, and any profit made on the sale, exchange, or other disposition, of public obligations. . . . Ohio R.C. § 5709.76.

The following provisions of the Ohio Constitution additionally exempt certain items of specific Ohio bond interest from taxation:

Art. VIII, § 2b Adjusted compensation for service in World War II.

Art. VIII, § 2c Construction of state highway system.

Art. VIII, § 2d Korean War bonus.

Art. VIII, § 2f Authorizing bond issue to provide school classrooms, support for universities, for recreation and conservation and for state buildings.

Art. VIII, § 2g Authorizing bond issue on other obligations for highway construction.

Art. VIII, § 2i Capital improvement bonds.

Art. VIII, § 2j Vietnam conflict compensation fund.

Art. VIII, § 2k Issuance of general obligations of the state to finance local government public infrastructure capital improvements.

Art. VIII, § 2*l* Parks, recreation, and natural resources project capital improvements.

STATEMENT OF THE CASE

Nature of the Case. Petitioner Serene G. Shaper contests the validity of Ohio R.C. § 5747.01(A)(1), which discriminatorily imposes Ohio income tax upon non-Ohio State and Municipal interest income while excluding interest received from Ohio issuers, because such discrimination on its face violates the Federal Constitution's Commerce Clause. Petitioner sought this refund as a class action refund claim.

Filing of Tax Return. Petitioner Serene G. Shaper is an Ohio taxpayer who receives and has reported municipal bond interest income from non-Ohio issuers. For each of the tax years in question, 1988 through 1991 calendar years, she completed and filed her tax returns in a timely manner. She originally reported as income, and paid resulting Ohio income tax upon, interest from non-Ohio state and local bonds. Seeking to challenge the legitimacy of the State discriminatory taxation of municipal interest from out-of-state bonds, the petitioner filed both refund claims for past years 1988 through 1991 and a declaratory action for future years.

Filing of Refund Claim. On August 3, 1992, Petitioner timely filed amended return refund claims seeking a class action refund of the Ohio income tax paid upon her non-Ohio municipal bond interest explicitly asserting that the discriminatory tax scheme violates the Commerce Clause.

Request for Prompt Disallowance. Anticipating the inevitable rejection of a class claim based on constitutional grounds [1], Petitioner conspicuously marked the refund

[1] Present Ohio caselaw holds that the Tax Commissioner and the Board of Tax Appeals may exercise only statutorily granted powers,

claims "TAXPAYER REQUEST PROMPT DISALLOWANCE" in bold type and marked with yellow highlighting in order to enable the matter to be speedily addressed by courts of competent jurisdiction to make appropriate determinations and grant appropriate relief.

The Parallel Declaratory Case (the "Declaratory Action"). At about the same time, the Petitioner filed a case in Common Pleas Court in Cuyahoga County, the Petitioner's residence, to obtain a prospective declaratory judgment for subsequent years, in order to eliminate the possibility that the issue would not be addressed at all. *Shaper v. Tracy*, Franklin County Court of Common Pleas, No. 92CVH-11-9271. That case was transferred to Franklin County before trial judge Hon. Evelyn Stratton, who granted the state's motion for summary judgment in her belief that the State's discriminatory taxation was exempt from Commerce Clause prohibition because, she felt, as the actions to benefit the States as a "market participant" bond issuer, and that the Commerce Clause does not apply to the actions of a state sovereign acting for its own interests. (Appendix I at 37a).

Tax Commissioner's Denial of Refund. In spite of the requested prompt disallowance, it was not until August 6, 1993 that the Tax Commisioner actually issued his Determination denying the refund claim. (Appendix D at

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thus they both lack the powers to adjudicate constitutional issues and are obligated to uphold all legislation as valid. *Evans Investment Co. v. Licking County Bd. of Revision*, Ohio BTA Case No. 83-C-723, 1985 WL 23216 (Sept. 19, 1985). And under existing law, they must reject class refund claims. *Herrick v. Kosydar*, 44 Ohio St.2d 128, 339 N.E.2d 626 (1975). Therefore, because this is a purely legal issue in which the Tax Commissioner and the Board of Tax Appeals had to reject Appellant's claim on both its substantive and procedural aspects, Petitioner explicitly and conspicuously requested that this refund claim and her appeal to the BTA be promptly denied in order that the issues of constitutional infirmity and procedural class-wide relief be addressed by the courts in a timely manner.

8a). His denial asserted three bases: (1) that class refund claims are not allowed under R.C. 5747.11; (2) that the statutory provision R.C. 5747.01(A)(1), which taxes only interest from non-Ohio bonds, does not violate the Commerce Clause of the United States Constitution; and (3) that the taxpayer failed to submit separate factual evidence itemizing her other income and proving that a tax on purely outside-sourced bonds' income constitutes discrimination or economic protectionism. (Appendix D at 8a).

Refund Appeal to the Board of Tax Appeals. On September 7, 1993, Petitioner timely appealed the Commissioner's denial of her refund requests. Nearly a year and a half later, on January 20, 1995, the Board of Tax Appeals ("BTA") finally issued a Decision and Order which affirmed the journal entry of the Tax Commissioner. Appendix C at 3a. The BTA affirmed, on the basis that (i) the Board of Tax Appeals was an administrative board lacking the jurisdiction to determine the facial constitutionality of a statute, (ii) R.C. 5747.11 does not provide for class action refund claims, and (iii) the taxpayer (Petitioner) had failed to provide certain information about her non-Ohio municipal income even though the hearing officer pointed out that the accuracy of Taxpayer's (Petitioner's) returns was not in issue. (Appendix C at 3a).

Declaratory Action Appeal. On appeal of the declaratory action, the Franklin County Appellate Court rejected the applicability of the market participant exception for a State's exercise of its taxing power, but affirmed, nonetheless, its belief that the Commerce Clause does not limit a State's actions done for its own benefit as a sovereign, as distinct from those cases invalidating protective action for local *private* businesses. *Shaper v. Tracy*, 97 Ohio App.3d 76, 647 N.E.2d 550 (1994).

Ohio Supreme Court Declines Discretionary Appeal of Declaratory Action. On March 1, 1995, acting on the

State's request to defer action on the declaratory action in favor of ruling in the refund track appeal, the Supreme Court of Ohio Court declined jurisdiction to hear the case. Taxpayer petitioned for writ of certiorari to this Court. This Court denied certiorari. *Shaper v. Tracy*, 116 S.Ct. 274 (October 2, 1995).

Ohio Supreme Court holds that the taxpayer was precluded on prior years' refund claims by declaratory action for later years. On the refund track appeal of right, the Ohio Supreme Court affirmed the denial of Petitioner's refund claim on the grounds that the petitioner's claims were barred by res judicata because the issues presented in the case for the prior years 1988-1991 were the same legal issues previously litigated by the parties in the Petitioner's declaratory judgment action for subsequent years. *Shaper v. Tracy*, 76 Ohio St.3d 241, 667 N.E.2d 368 (1996), Appendix B at 2a. Petitioner's timely Motion for Reconsideration was denied. Appendix A at 1a.

REASONS FOR GRANTING THE PETITION

I. A STATE'S DISCRIMINATORY INCOME TAXATION OF INTEREST ON ONLY OTHER STATES' MUNICIPAL BONDS IS THE OBVIOUS NEXT STEP IN THIS COURT'S ENFORCEMENT OF THE NEGATIVE COMMERCE CLAUSE TO ACHIEVE AN INTERNALLY BORDERLESS ECONOMY.

A. The Issue of Whether a State May, Under the Commerce Clause, Discriminatorily Impose Its Income Tax on Only Other States' Municipal Bonds' Interest Is an Issue of Overwhelming Timeliness and Importance:

(a) to the states, because this type of statutory discrimination exists in 37 states;

(b) to the state courts and legislatures, who are themselves uncertain about its constitutionality but cannot unilaterally invalidate or rescind their provision to their competitive disadvantage, and

(c) to the nationwide municipal bond market, since it would eradicate the current state barriers to the nationwide market flow of municipal bonds.

This case presents the logical next step in the court's implementation of the negative commerce clause to achieve an internally borderless economy. As already recognized by the major financial journals [2] this case presents an issue of vast importance to the public, to State governments and to the municipal bond markets nationwide.

1. *This issue is of overwhelming importance to the states and their taxpayers*

Thirty-seven other states have provisions similarly taxing municipal interest on only out-of-state bonds.[3] The

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[2] *See Articles*: Pierog, "Ohio's Tax on Out-of-State Bonds Spurs Suit That Worries Industry", *The Bond Buyer*, September 9, 1993 at Page 1, Column 3 (Appendix L at 46a); Thomas T. Vogel, "Ohio Suit Threatens Tax Advantages of Buying Single-State Municipal Funds and In-State Bonds", *Wall Street Journal*, December 14, 1993 at C6 (Appendix K at 43a).

[3] Ala. Code § 40-18-14(2)(d), (f), 40-18-14(3) (1994), Ariz. Rev. Stat. Ann. § 43-1021(4) (1995), Ark. Code Ann. § 26-51-404(b)(6) (1994), Cal. Rev. & Tax Code § 17133 (1995), Colo. Rev. Stat. § 39-22-104(3)(b) (1995), Conn. Gen. Stat. Ann. § 12-505(a)(4)(B) (1995), Del. Code Ann. tit. 30, § 1106(a)1 (1994), Ga. Code Ann. § 48-7-27(b)(1)(A) (1994), Haw. Rev. Stat. § 235-7(a)(5), (b)(2) (1994), Idaho Code § 63-3022(a) (1994), Ky. Rev. Stat. Ann. § 141.010(10)(c) (1995), La. Rev. Stat. Ann. § 47:293(6) (1995), Me. Rev. Stat. Ann. tit. 36, § 5122(1)(A) (1994), Md. Ann. Tax-Gen. Code § 10-203, 10-204(b) (1957), Mass. Gen. Laws Ann. ch. 62, § 1, 2(a)(1)(A) (1995), Mich. Stat. Ann. § 206.30(1)(a) (1995), Minn. Stat. Ann. § 290.01(19a)(1)(i) (1995), Miss. Code Ann. § 27-7-15(4)(d) (1994), Mo. Ann. Stat. § 143.121(2)(b) (1995), Mont. Code Ann. § 15-30-111(1)(a) (1993); Neb. Rev. Stat. § 77-2716(1)(a), (b), (c) (1994), N.H. Rev. Stat. Ann. § 77:4(1) (1993), N.J. Rev. Stat. § 54A:6-14 (1995), N.M. Stat. Ann. § 7-2-2(V) (1994), N.Y. Tax Law § 612(b)(1) (1995), N.C. Gen. Stat. Ann. § 105-134.6(c)(1) (1994), N.D. Cent. Code Ann. § 57-38-01.2(1)(g) (1993), Ohio Rev. Code Ann. § 5747.01(A)(1)

financial community has recognized both the local interests protected by the obvious discrimination and the national market benefits of nationwide marketability for each state's bonds.[4]

Nonetheless, a fair resolution of this issue is impossible, except by this Court. The Eleventh Amendment's underpinnings require that this case (and any others elsewhere) be initiated in the State courts. But each State's courts are effectively bound to uphold the discrimination, since finding their own statutory discrimination invalid, puts their State at a competitive disadvantage with the other discriminating states,[5] over whose tax provisions

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(1991), Okla. Stat. Ann. tit. 68, § 2358(A)(1) (1995), Or. Rev. Stat. Ann. § 316.680(2)(a) (1994), Pa. Const. Stat. Ann. tit. 72, § 7303(a)(3), (6) (1995), R.I. Gen. Laws § 44-30-12(b)(1) (1994), S.C. Code Ann. § 12-7-430(b)(1) (1993), Tenn. Code Ann. § 67-2-104e (1994), Vt. Stat. Ann. tit. 32, § 4811(1) (1994), Va. Code Ann. § 58.1-322(B)(1) (1994), W. Va. Code Ann. § 11-21-12(b)(1) (1994).

Based just on this discriminatory tax treatment, there are literally trillions of dollars invested in in-state municipal bonds and single-state municipal bond funds marketed to residents of the tax-discriminatory states. *Fund Directions: Vital News for Informed Trustees and Directors*, Volume Three, Number One, p. 1, January 1994.

[4] *See e.g.* Thomas T. Vogel, Jr., *Ohio Suit Threatens Tax Advantages of Buying Single-State Muni Funds and In-State Bonds*, The Wall Street Journal, December 14, 1993 at C19. Richard Lehmann, president of the Bond Investors Association, noted, "[s]uch taxing practices give some states a certain advantage in the municipal-bond market at the expense of other states. States with low taxes and a small population, for example, see the demand for their bonds weakened when larger states with higher taxes levy taxes on the income from the smaller states' bond issues. A legal precedent that prevented states from taxing the income from municipal bonds of other states could help boost demand for such low tax states. . . It may be good for the municipal market because it could improve the liquidity."

[5] Richard Lehmann, president of the Bond Investors Association, recognized that "[t]his is something that will never be favorably ruled on at the state level . . . it does have to go to the Supreme

they have no jurisdiction.[6]

2. *Major uncertainty over the issue concerns the state legislatures*

Explicitly due to concern about this issue in this case,[7] legislation has been enacted in at least one other State (Minnesota) to anticipate the result of this case by eliminating its own tax exemption for its state and local bonds, joining the five states that already tax interest income on most of their own bonds—Illinois, Iowa, Kansas, Oklahoma and Wisconsin.[8]

The states are thus obviously recognizing the impropriety of this practice. However, without direction from this Court, the political pressures render it almost impossible for any one State's legislature or supreme court to unilaterally drop its protectionist local benefit provisions to its competitive disadvantage as long as other states' discriminatory tax barriers remain in place for their competitive advantage. *See* Enrich, Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives For Business, 10 Harv. L.Rev. 378, 405-423 (1996).

3. *The issue is of tremendous importance to the operation of the nationwide market for municipal bonds*

The financial journals have already noted the importance of the issue and the likely correctness of Petitioner's

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Court." Thomas T. Vogel, *Ohio Suit threatens Tax Advantages of Buying Single-State Muni Funds and In-State Bonds, The Wall Street Journal*, December 14, 1993 at C19.

[6] *See Bonaparte v. Tax Court*, 104 U.S. 592 (1881).

[7] A Minnesota House legislative analyst stated that the bill was proposed to head off liability that might arise from this lawsuit in the Ohio courts. Cris Carmody, *Proposed Minnesota Bill Would Tax Interest From State, Local Bonds*, The Bond Buyer, March 22, 1995 at Page 1, Column 2 (Appendix M at 50a).

[8] But even those states present some form of discrimination. For example, Illinois also exempts certain specific Illinois issues by statutes unique to those bonds. 35 ILCS 5/203(a)(2)(A).

argument.[9] If petitioner prevails, *all* municipal bonds would become marketable nationwide, and each state's bonds would have a nationwide market potential, expanding the saleability of every state's bonds.

B. As Explicit Discrimination Against Commerce to Center or Corner the Market for Municipal Bond Purchasers, the Discriminatory Tax Is Per Se Invalid and Lacks Any Saving Purpose Unrelated to Economic Protectionism

A State statutory provision which discriminates *on its face* against interstate commerce is subjected to a nearly *per se* rule of invalidity; no balancing is done. *Oregon Waste Systems Inc.*, 511 U.S. 93 (1994).[10] There is no need to prove intent or the volume of commerce affected. *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).[11] If a facially discriminatory statute is ever viable, it is only if the discrimination is demonstrably justified by a valid

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[9] The expected impact of a nationwide bond market would be beneficial to many states whose bonds presently face hurdles to sale in major markets. And while some states might do worse in such an environment, the vast benefits we as a nation have reaped from having nationwide markets for consumer goods and services and corporate securities, bodes against any harbor of local markets. *See Articles*: Pierog, "Ohio's Tax on Out-of-State Bonds Spurs Suit That Worries Industry", *The Bond Buyer*, September 9, 1993 at Page 1, Column 3 (Appendix L at 46a); Thomas T. Vogel, "Ohio Suit Threatens Tax Advantages of Buying Single-State Municipal Funds and In-State Bonds", *Wall Street Journal*, December 14, 1993 at C6 (Appendix K at 43a).

[10] Facially non-discriminatory provisions are instead reviewed under the so-called *Pike* test, *Pike v. Bruce Church*, Inc., 397 U.S. 137, 142 (1970), upholding the regulation unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits.

[11] "Where discrimination is patent, as it is here, neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown." *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 274.

factor unrelated to economic protectionism. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988).[12]

Tax provisions obtain no special priority in Commerce Clause scrutiny. State tax provisions are subject to the same Commerce Clause limitations as other state regulations. The States' broad discretion to configure their taxation systems as they deem appropriate, has long been "bounded by any relevant limitations of the Federal Constitution, in this case the negative Commerce Clause." *Oregon Waste*, 511 U.S. at 95.[13] Once viewed from a Privileges and Immunities perspective, this Court has consistently invalidated state tax discrimination against income received from other states. *Colgate v. Harvey*, 296 U.S. 404, 430ff (1935). More recently, that virtually per se rejection of discriminatorily taxing income from commerce has resided in the so-called "negative" or "dormant" Commerce Clause.

And, insofar as it is relevant, the State's intention here is purely discriminatory.[14] Admittedly motivated solely

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[12] Invalidating Ohio's discriminatory sales tax on sales of ethanol, which exempted sales of ethanol produced from Ohio (or states which grant reciprocal tax exemption or benefits for Ohio-produced ethanol), holding that the "negative" or "dormant" aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. *Id.* at 273, *Id.* at 1807.

[13] In *Boston Stock Exch. v. State Tax Comm.*, 429 U.S. 318 (1977), this Court invalidated a New York State transfer tax provision imposing a higher rate upon outside New York transfers of NYSE-listed shares whose "obvious effect" was to force the trading of New York-listed stocks to occur in New York. Because the discriminatory tax "foreclose[d] tax neutral decisions and create[d] both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister states," a unanimous Supreme Court struck the provision, concluding: "[t]his diversion of interstate commerce and diminution of free competition in securities sales are wholly inconsistent with the free trade purpose of the Commerce Clause." *Id.* at 335.

[14] As the trial Judge Stratton noted in the declaratory actions September 13, 1993 proceedings: "What other intent could be

by protectionist purposes, the State's sole avowed purpose here—to "center" (corner) the market for Ohio public sector bonds in Ohio and those of other states in their own respective states—is pure economic protectionism. To erect barriers in the Ohio market against the entry of other states' bonds, encouraging the other states to erect similar walls around their own resident investors, bespeaks a pernicious Balkanizing concept that is at odds with an efficient and effecive internally borderless national economy. (*See Also Oregon Wastc Systems Inc. v. Dept. of Environmental Quality*, supra, 511 U.S. 93 (1994); *C & A Carbone Inc. v. Clarkstown*, 511 U.S. 383 (1994)).

C. The State Court Decision Below Upholding the Differential Taxation of Interstate Interest Conflicts With the Only Federal Decisions Addressing the Issue

The legality of differentially taxing interstate interest income has been definitively addressed and rejected in one reported case. In *Dominion National Bank v. Olsen*, 771 F.2d 108, 111 (6th Cir. 1985), the Sixth Circuit invalidated Tennessee's tax upon earnings from certificates of deposit issued by out-of-state financial institutions while exempting such earnings from Tennessee banks. Following this Court's clear Commerce Clause lead, the Sixth Circuit held that the statute invalidly discriminated against commerce by "providing a direct commercial advantage" to Tennessee financial institutions over out-of-state financial institutions, by inducing Tennessee residents to invest in certificates of deposits issued by in-state rather than out-of-state banks. *Id.*, quoting *Boston Stock Exchange*, 429 U.S. at 329.[15]

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intended?" (Appendix J at 37a). Indeed, defendants' counsel Pratt acknowledged: "That is economic protectionism. That is the life blood of the sovereign itself. That is a government function." (Appendix J at 37a).

[15] The Court also rejected *Dominion National Bank* defendants' argument to distinguish *Boston Stock Exchange* as a direct tax

D. The Invalidity of Ohio R.C. 5747.01(A)(1) Is the Next Obvious Step in This Court's Eradication of Balkanizing State Tax Provisions

The issue of tax discrimination against out-of-state bond interest is clearly the timely next step in this Court's ongoing efforts to achieve an internally borderless economy.[16] This Court has long rejected state efforts to Balkanize the nation by erecting barriers against the movement of goods across state lines. Early Commerce Clause cases invalidated state regulations on milk sales whose necessary

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upon an interstate securities transfer transaction, from *Boston Stock Exchange's* tax upon local receipt of income derived from an interstate transaction. *Id.* at 118 (Contie, J., concurring). The court was not convinced. Relying primarily on *Maryland v. Louisiana*, 451 U.S. 725 (1981), the court indicated that "[i]n each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Dominion Nat'l Bank*, 771 F.2d at 111 (quoting *Maryland v. Louisiana*, 451 U.S. at 756); *see also Id.* at 118 (Contie, J., concurring) ("[T]he fact that the challenged tax is assessed against receipt of income in Tennessee rather than against an interstate transaction . . . is irrelevant").

The Court also rejected, the *Dominion* defendants' argument that the tax differential was justifiable as a measure to compensate for Tennessee's inability to apply to out-of-state banks the Tennessee tax laws and banking regulations under which the Tennessee banks must operate. *Id.* at 111. The court was similarly unpersuaded, "[t]he common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce. . . . We find no such equality of treatment in our instant case." *Id.*, quoting *Maryland v. Louisiana*, 451 U.S. at 759.

[16] The issue of each State's ability to obtain competitive advantage for itself and its citizens is one of great and continuing timeliness. Note the two recent articles both appearing just last week positing that the States' creation of discriminatory benefits favoring incoming business itself violates the dormant Commerce Clause. *See Enrich, Savings the States From Themselves*, 110 Harvard L. Rev. 377 (1996); *Hellerstein and Coenen, Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789 (1996).

effect was to protect state producers.[17] Recent Commerce Clause decisions, rejecting state arguments that *garbage* is not a protectible item of commerce, have routinely "trashed" state-erected taxes and other regulatory barriers to the "free flow" of garbage across state lines and have invalidated as impermissible protectionism discriminatory provisions.[18] In each case, this Court held that the local

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[17] *WestLynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) is only the most recent. *Baldwin v. Seelig, Inc.*, 294 U.S. 511 (1935), invalidated the New York Milk Control Act's prohibition of retail sales in New York of out-of-state milk, if the milk had been purchased at a lower price than the Act's minimum "set" price for sales by New York producers. *Id.* This Court held that the Act's operation unconstitutionally "set a barrier to traffic between one state and another as effective as if custom duties, equal to the price differential, had been laid upon the [goods]." *Id.* at 521. This Court rejected New York's argument that its regulation was justified by the need to assure a regular and adequate supply of milk—that if farmers could not earn a living wage from producing milk, the resulting lack of milk supplies would endanger public health—since that rationale would apply to *all* cases of state-enacted trade barriers to protect its own industry. *Id.* at 523.

In *Dean Milk Co. v. Madison*, 340 U.S. 349, 350 (1951), this Court invalidated a Madison, Wisconsin ordinance prohibiting the sale of any milk as pasteurized unless it had been processed at a plant "within a radius of five miles from the central square of Madison." Similarly, this Court found that ordinance erected an economic barrier protecting a major local industry against competition from without the state, plainly discriminating against interstate commerce. *Id.* at 354. Dispatching the city's argument that the regulation might have been motivated by bona fide safety and health concerns to enable easy inspection of pasteurization quality control to guard against the sale of adulterated milk, rather than a protectionist goal, this Court found the regulation nonetheless invalidly discriminated against interstate commerce. *Id.*

[18] The Court thus invalidated provisions that: (a) prohibited the inflow of imported waste for disposal (*Philadelphia v. New Jersey*, 437 U.S. 617 (1978); imposed higher dump tax rates (*Chemical Waste Management Inc. v. Hunt*, 504 U.S. 334 (1992)); or imposed more difficult permit requirements (*Fort Gratiot Landfill v. Mich. Dept. of Nat. Res.*, 504 U.S. 353 (1992)), on incoming "imported" toxic waste; or (b) conversely erected statutory "flow control" walls

government's benign desire to either preserve its resources, generate revenues or finance worthwhile projects could not be legitimately accomplished by constructing barriers to the free flow of interstate trade.

At the same time Justice Souter spoke for the Court of the Framers' view of an internally borderless nation in *Upholding* a sales tax imposed at a uniform rate upon the sale of bus tickets for travel, regardless of whether the trip is interstate or purely intrastate.

> . . . We have understood this construction to serve the Commerce Clause's purpose of preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commence wholly within those borders would not bear. The provision thus reflects a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation. *Okla-*

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to prevent the *outflow* of garbage and capture its processing (and thus the incidental processing fees) to secure the financing for construction and acquisition of a municipal waste treatment plant. *C & A Carbone, Inc. v. Clarkstown,* 511 U.S. 383 (1994). And although *Chemical Waste* reserved decision on whether a state might be permitted to impose a surcharge to deflect the actual cost differential in disposing of incoming toxic waste, *id.*, this Court sealed that "opening" shut two terms later in *Oregon Waste Systems Inc. v. Dept. of Environmental Quality,* 511 U.S. 93 (1994). Justice Thomas opinion for the 7-2 majority rejected Oregon's differential surcharge on incoming garbage as not a "compensatory" tax since the state could not show that it cost more to deal with imported garbage than to handle domestic garbage. Since the surcharge was discriminatory on its face, the virtually per se rule of invalidity provided the proper legal standard, and the provision was unsalvageable because the State could not meet its burden to show a legitimate local purpose that could not be adequately served by reasonable nondiscriminatory alternatives. *Id.*

homa Tax Commission v. Jefferson Lines, Inc., —— U.S. ——, 115 S.Ct. 1331 (1995).

The timeliness of this issue is underscored by the States' determination to continue testing this court's resolve. Thus, the States continue to erect and enforce protectionist provisions, both new and historic, in the face of this Court's repeated expression of its continued appetite for Commerce Clause cases, its acceptance of uniform state taxes which do not discriminate against commerce, and its unyielding distaste for protectionist taxes. It is not that the case law is unclear, it is simply that the political pressures in favor of even the most obviously invalid provisions have proven irresistible. *See*, e.g. *Fulton v. Faulkner*, —— U.S. ——, 116 S.Ct. 848 (1996) (Opinion by Souter, J. for unanimous court, concurring opinion by Rehnquist, C.J., invalidating a state intangibles tax whose rate upon corporate securities was proportional to the issuing corporation's exposure to that state's income tax).

E. The State Court's Creation of a New "Sovereign Interest" Exemption to Commerce Clause Scrutiny for State's Self-Interested Actions Spins a Potentially Vast Threat to This Court's View of an Internally Borderless Nation.

The "sovereign interest" exception created below—that the Commerce Clause does not limit a state "sovereign" acting in its *own* interest, as distinct from discriminatory actions favoring local *private* interests—is one that has already been wisely rejected and would pose an exception capable of swallowing up this Court's entire body of "Negative Commerce Clause" decisions.

While much of the existing body of Commerce Clause decisions invalidate local tax provisions that were intended to benefit local *private* interests, the Court has never even suggested that a State may discriminate against commerce to prefer or favor its own interests. Presuming that a State is *always* acting for what it perceives as the public in-

terest, all State activity may be viewed as in some way directed to its own sovereign interest.

There is no reported decision (except the decision below) permitting a State to discriminatorily tax to benefit its own direct "sovereign" or entity interests. Furthermore, the decisions are uniformly hostile to any exemption for any sovereigns, states or nations from laws enacted under the authority of the Commerce Clause.[19]

Indeed, in *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994), the dissent clearly asserted that the Commerce Clause should not preclude a state's use of its regulatory powers to benefit its own (as distinct from its private citizens') commercial interest. The local "flow control" ordinance at issue here prohibited the outflow of local garbage, requiring it to be processed at a local governmental facility, in order to ensure adequate "tipping fee" revenue to finance construction and the local government's acquisition of the waste facility for itself. Justice Souter's minority dissent squarely argues that the discrimination should have been permitted, precisely *because* "the one favored facility is a governmental facility." *Carbone*, Souter dissent, 511 U.S. 383 (1994). The "sovereign" exemption was thus recognized but reqected.

Moreover, the sovereign interest exemption would open up the courts to a vast new body of law over what state sovereign interests are protectable and how close the contested provision is to that sovereign.[20]

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[19] In *United States v. California*, 297 U.S. 175 (1936), a state-operated railroad was fully subject to regulation by Congress acting within the Commerce Clause:

> "The State can no more deny the [Congress' plenary Commerce Clause] power if its exercise has been authorized by Congress than can an individual." 297 U.S. at 185.

(See Also Republic of Argentina v. Weltover, 504 U.S. 607 (1992) holding Argentina as a bond issuer to be subject to U.S. federal securities laws passed under the Commerce Clause).

[20] It would also invite the States to try reopening most cases invalidating the local private interest protection provisions, as justifiably based on a sovereign interest as well.

II. THE STATE'S MANIPULATION OF ITS' TWO-TRACK TAX CHALLENGE SCHEMA TO PRECLUDE TAXPAYERS FROM OBTAINING HIGHEST COURT ADJUDICATION OF HER CONSTITUTIONAL CHALLENGE TO A FACIALLY INVALID TAX DISCRIMINATION VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION [21]

This Court also needs to address the issue of how far the States may go to preclude plaintiffs from challenging state tax provisions. The difficulty in challenging any state tax provision is daunting and well documented.[22]

So the State's manipulation of the two-track challenge here ought to concern this court greately. The taxpayer here sought both avenues—declaratory relief *and* refund suit, to bring the issue to decision. The States' manipulation of this good faith effort into an impossible-to-win shell game provides a roadmap for other states to thwart a challenge by anyone.

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[21] The Fourteenth Amendment of the United State's Constitution states:

> Seciton 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[22] Enrich, Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives For Business, 110 Harvard L. Rev. 378 (1996) at 405 ff, and Hellerstein & Coenen, Commerce Clause Restraints on State Business Development Incentives, 81 Cornell L. Rev. 789, at 871 ff (May 1996) both note the difficulties in raising such a challenge. The federal courts are generally unavailable, due to the underpinnings of the Eleventh Amendment and the affirmative preclusion of the Tax Injunction Act, 28 U.S.C. 1341 (1994), and the state courts are subject to political pressures against unilaterally eliminating protectionist taxes competitively employed by other States.

The States' herculean procedural efforts to thwart state tax challenges are as persistent as their defense on the merits. This Court has had to spend an inordinate amount of time to ensure that taxpayers have some meaningful way to test the constitutional validity of state tax provisions. As last set forth in *James B. Beam Distilling Company v. Georgia*, 501 U.S. 529 (1991), a State must afford at least either a prospective challenge (generally by declaratory litigation) or a retrospective challenge (by refund claim and suit). Here, the State tax authorities delayed handling the refund claim to follow the declaratory action. The tax authorities then claimed that the declaratory action was not a suitable vehicle for exercising discretionary jurisdiction. They convinced the Supreme Court of Ohio to decline the case. Then, when the refund suit reached the Supreme Court of Ohio on mandatory appeal, the State argued that the Court was bound by the prior case.

The State's manipulated derailment of the traditional two-track declaratory relief/refund claim scheme as a means to preclude highest court adjudication is precisely the shell game approach that concerned this Court in *Reich v. Collins*, 513 U.S. 106 (1994).

Regardless of the analogy employed, the maintenance of a Byzantine method of challenge might still be allowed if at least one of the tracks was permitted to reach their destination of a final highest court ruling. The taxpayer here launched both actions precisely to eliminate any possibility of being on the wrong single track or lost in the space between. Consequently, since the inception of this lawsuit, the Commissioner has consistently argued [23]

[23] While Petitioner's counsel had initially been advised that a quick response would be forthcoming, that delay continued while the Attorney General's counsel (who had admittedly been in contact with the Commissioner about this refund action) repeatedly asserted that the declaratory action should be dismissed because of the quick and direct route that this refund case presented. Nonetheless, it took the refund case three years to reach the Supreme Court of Ohio, as an appeal of right. Clearly, there was behind-

that the Ohio Courts should decline its discretionary jurisdiction to hear that *declaratory* action because, under Ohio law, this *refund* action carries an appeal of right. So the Ohio Supreme Court took a pass, as did this court. *Shaper v. Tracy*, —— U.S. ——, 116 S.Ct. 274 (1995). However, when this refund claim action reached the Supreme Court of Ohio on appeal of right, the Tax Commissioner then switched gears, arguing now that the Ohio Supreme Court should *not* hear this refund action because the result in the declaratory action for *subsequent* years constituted a res judicata bar against the taxpayer for the *prior* refund years.

Incredibly, the Supreme Court of Ohio agreed with the Tax Commissioner, holding that the Petitioner's claims were barred by res judicata because the issues presented in the case were the same legal issues previously litigated by the parties in the Petitioner's declaratory judgment action.

Under federal tax law procedure such a result could not have occurred. It is well entrenched that a decision for one federal tax year is not binding against other, usually future years.

The long held federal rule is that the tax liability of the same taxpayer for a different taxable year represents a different cause of action, even if the issue in both years is identical. *Commissioner v. Sunnen*, 333 U.S. 591 (1948).[24] Nor was this a new concept at that time. *See*

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the-scenes activity to keep this claim under wraps on one hand, until the declaratory action could be dispatched, after which the attorney general's office asserted that the Supreme Court of Ohio was precluded from addressing the constitutional issues as collaterally estopped by the decision in the declaratory action. Such a shell game tactic by the State, all in an effort to prevent the issue from ever being addressed at all, violates Petitioner's due process of law.

[24] In *Sunnen*, the taxpayer, an inventor-patentee and president of Sunnen Products Co., entered into several agreements with Sunnen where Sunnen licensed to manufacture and sell various devices on which the taxpayer had applied for patents. The tax-

Keokuk & W.R. Co. v. State of Missouri, 152 U.S. 301, 314 (1894), holding that res judicata never applies from one taxpayer year to another, because the tax liabilities for different tax years are for distinct and separate causes of action.[25]

Ohio Courts used to follow this rule, and thus have also held that res judicata does *not* apply in tax cases where different years are involved. In *State ex rel. Herbert v. Brotherhood of Railroad Trainmen Ins. Dep't.*, 74 Ohio App. 263, 272, 54 N.E.2d 320, 324 (1944), the Franklin County Court of Appeals stated:

> *even where there is no issue which was not adjudicated in the prior case, where taxes for a subsequent year are involved, the prior action is not determinative of the subsequent proceeding between the same parties.* (emphasis added).

In that case, the court held that a judgment in a prior action seeking to recover domestic insurance company franchise taxes for the years 1936 through 1939 was not res judicata of issues in a subsequent action against the same defendant for franchise taxes for years 1940 and 1941.

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payer received royalties from the gross sale price of the devices. The taxpayer assigned the title and power over these royalties to his wife as gifts and she included all the payments as income in her income tax returns. The Tax Court held that all the royalties paid to the wife from 1937 to 1941 were part of the taxpayer's taxable income. The Supreme Court held that the royalty payments growing out of the license contracts were not involved in the earlier action before the Board of Tax Appeals and which concerned different tax years and were free from the collateral estoppel doctrine. *Sunnen*, 333 U.S. at 601.

[25] This was an action brought in the circuit court of Missouri for Scotland County, by the state, suing for the collector of revenue for Scotland County, against the Keokuk & Western Railroad Company, to charge its property with an alleged lien for state and county taxes levied on the property of the Missouri, Iowa & Nebraska Railway company for the year 1886.

And this concept generally benefits the taxing body, rather than the taxpayer. For example, *Keokuk*, citing *Davenport v. Railway Co.*, 38 Iowa 633 (1874), in which the Supreme Court of Iowa held that a decree in favor of a railway company in a suit for a prior year's taxes would not estop the state from collecting the taxes in a subsequent year, each year's taxes constituting a distinct and separate cause of action even if the issues are the same, declared the concept as essentially state-protective:

> . . . Taxes of separate years do not in any just sense grow out of the same transaction. They are like distinct claims on two promissory notes, made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties. It could never be tolerated that the state should be forever barred in its collection of taxes by an erroneous decision. *Keokuk*, 152 U.S. at 316.

A. Collateral Estoppel (Issue Preclusion) Does Not Cross Tax Years.

Post-*Sunnen*, the Supreme Court held that a case involving the same facts, questions and parties, but different tax years, was also not appropriate for collateral estoppel (*issue* preclusion) in a decision benefitting the State, not the taxpayer. *Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984) (*Hooven II*).[26] The Court held that while the parties, the tax, and the goods imported in their containers were the same in *Hooven II* as

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[26] In that case, a personal property tax dispute over the 1976 and 1977 tax years was held to be a different action than the personal property tax dispute over the same issues presented in *Hooven & Allison Co. v. Evatt* (*Hooven I*), 324 U.S. 652 (1945), *overruled by Hooven II*, 466 U.S. 353 (1984), for the 1938, 1939 and 1940 tax years. Ohio was not collaterally estopped from assessing ad valorem personal property taxes on like imported fibers still in their original packages imported by the same manufacturer.

in *Hooven I*,[27] the years involved were not. *Hooven II*, 466 U.S. at 354. The Court's wrongly invalidating the tax at issue for the early years was held not to prevent its being correctly upheld against the same taxpayers with respect to the same property for subsequent years. And this was not inadvertent. The Court pointed out that although the parties in this case were the same as those in *Hooven I*, the property sought to be taxed for 1976 and 1977 identified with the property sought to be taxed for 1938, 1939 and 1940 in *Hooven I*, and the tax involved was the same Ohio nondiscriminatory ad valorem personal property tax as in *Hooven I*, the doctrine of collateral estoppel did *not* apply because the years involved were different. *Id.* at 362.

B. Even Where Collateral Estoppel Could Otherwise Apply, It Applies Only Narrowly to Issues Actually Adjudicated, Not Merely Declined, and Not Where It Would Work an Injustice.

The application of collateral estoppel (issue preclusion) is limited to issues which have been raised, litigated and actually adjudicated before (not just declined) and where its application would not be unjust.

Under *Commissioner v. Sunnen*, 333 U.S. at 597, collateral estoppel can be applied between tax years only to matters which were actually litigated (not merely declined):

> . . . Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability

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[27] Hooven & Allison Co. was an Ohio manufacturer that imported natural fibers for its use in the manufacturing process. However, preliminary to its use by the Company, the fiber was stored in the Company's warehouse in their original packages in which they had been imported. In both cases, the Company listed these fibers as "imports" (immune from state taxation under Article I, section 10, clause 2 of the Constitution) but deducted their value from the total value of the manufacturing inventory.

> or non-liability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year. But if a later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as a collateral estoppel only as to those matters in the second proceeding that were actually presented and determined in the first suit. *Id.* . . .

and should not be applied where it would work an injustice:

> . . . And so where two cases involve income taxes in different taxable years, collateral estoppel must be used with limitations carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged. If the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation. *Id.* at 599-600.

Indeed, it would be well taken to hold that due process itself requires that one year's tax determination is not binding (res judicata) against either party for other years, certainly not prior years.

C. Precluding Any Adjudication Works Injustice and Violates Due Process.

This Court has repeatedly shown that it favors a means by which taxpayers can obtain redress. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court held that Hawaii's Liquor Tax, a 20% excise tax imposed on sales of liquor at wholesale, but exempting for the tax certain locally produced alcoholic beverages was unconstitutional as it violated the commerce clause.

A State must provide either prospective or retroactive relief. In *James B. Beam Distilling Company v. Georgia,*

501 U.S. 529 (1991), this Court held that its decision in *Bacchus Imports* should apply retroactively to claims arising on facts antedating that decision, and held that application of the rule in that case required its application retroactively in later cases. *Id.* at 2441. This Court stated:

> In the civil context, "even a party who is deprived of the full retroactive benefit of a new decision may receive some relief." *Smith*, 496 U.S. at 198-199, 110 S.Ct. at 2342. Had the appellants in Bacchus lost their bid for retroactivity, for example, they would nonetheless have won protection from the future imposition of discriminatory taxes. *Id.* at 2446.

In *Harper v. Virginia Department of Taxation*, 509 U.S. 89 (1993), retired federal employees sought refunds for state income taxes. *Id.* As in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), Virginia had exempted state and local employees' retirement benefits from state income taxation, while taxing federal retirement benefits. *Id.* Petitioners, 421 federal civil service and military retirees, sought a refund of taxes "erroneously or improperly assessed" in violation of Davis' nondiscrimination principle. *Id.* This Court held that the decision in *Davis* applied retroactively. This Court noted that Virginia was free to choose the form of relief it would provide, so long as that relief is consistent with federal due process principles. *Id.*

Most recently, in *Reich v. Collins*, 513 U.S. 106 (1994), this Court expressed its exasperation and the end of its tolerance for the many State Supreme Courts' efforts to thwart refunds which are legitimately owed.[28]

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[28] Georgia, like numerous other states had taxed retirement benefits paid to federal retirees while exempting those paid to the state retirees prior to the decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989). Georgia then repealed its state retiree tax exemption, but opposed refunding federal retirees the unconstitutional taxes they had paid before the Court's 1989 decision in *Davis*. Even after *Harper v. Virginia Dept. of Taxation*, 509 U.S.

In an extremely irate opinion, the Court accused the Georgia Supreme Court of bait-and-switch tactics in refusing the taxpayer's claimed refund because the Georgia refund statute was enacted after the tax was assessed and collected. Justice O'Connor, for a unanimous Court, castigated Georgia's holding out on what appeared to be a clear and certain postdeprivation remedy, only to declare, *after* a taxpayer has paid disputed taxes, that the remedy does not exist.

Clearly the Court's patience has ended for state courts abdicating their lawful role of independent, impartial tribunals and instead taking up the mantle of defenders of the state fisc. Similarly, here, the State succeeded in its efforts to have the declaratory action declined, in favor of this refund case are, we understand now focused on having the Supreme Court of Ohio dodge the issue or hold Petitioner collaterally estopped by the declaratory action in which that same court declined jurisdiction. Such shell game tactics by the State foster an understandably cynical view of the integrity of the process, and should not be condoned.

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89 (1993), the Georgia Supreme Court sought to thwart refunds under its own refund statute where the law under which the taxes were assessed and collected was itself subsequently declared to be invalid. It then denied Reich's petition seeking reconsideration under *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18 (1990) and similar cases, which establish that due process requires a "clear and certain" remedy for taxes collected in violation of federal law, and that a State may provide that remedy before the disputed taxes are paid (predeprivation), after they are paid (post deprivation), or both. *Id.* Reich petitioned for certiorari, the U.S. Supreme Court remanded for further consideration in light of *Harper v. Virginia Dept. of Taxation*, which had relied on *McKesson* in circumstances similar to this case. In again denying Reich's refund claim, the State Supreme Court reviewed Georgia's predeprivation remedies and found those remedies to be now ample, but not available to him and again rejected his claim. *Id.*

The ironic injustice of the situation here is that it was created intentionally by the State's duplicitous request that the Supreme Court of Ohio decline to exercise its *discretionary* jurisdiction in the declaratory case appeal in order to hear the issues rather in *this mandatory* jurisdiction refund litigation,[29] only later to assert that the Supreme Court of Ohio was precluded from adjudicating this case by its having acceded to the Commissioner's request.

Such a "shell game" manipulation of the tax challenge process should not be tolerated. Due Process and the judicial system are not to be run as the State's game, in which the litigants against the State are strategically doomed by legerdemain, in which the taxpayer is first declined under Shell No. 1 (because Shell No. 2 is there and preferred), but then must lose under Shell No. 2, because she was declined under Shell No. 1.

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[29] Based on an argument that the issue is appropriately raised and should rather be addressed in this case: ". . . would have the tendency to cripple the state's tax system by encouraging frivolous attacks on provisions properly dealt with at the Board of Tax Appeals level. . ." Memorandum of Appellee/Cross-Appellant Tax Commissioner in Opposition to Jurisdiction of Appeal and In Support of Jurisdiction of Cross-Appeal at 12. *Shaper v. Tracy*, Supreme Court No. 94-2439.

CONCLUSION

This case squarely puts at issue the constitutionality of taxing the interest on out-of-state municipal bonds while exempting interest on in-state municipal bonds and how far a state may manipulate the two-track declaratory action/refund claim scheme under the concept of res judicata to thwart a taxpayer's ability to challenge the legality of the substantive tax provision.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

SUPREME COURT OF OHIO

No. 95-389

SHAPER

v.

TRACY

Oct. 2, 1996

RECONSIDERATION DOCKET

Appeal from: Board of Tax Appeals, No. 93-X-1032.

On motion for reconsideration. Motion denied.

STRATTON, J., not participating.

APPENDIX B

SUPREME COURT OF OHIO

No. 95-389

SHAPER,

Appellant,

v.

TRACY, Tax Commr.,

Appellee.

Submitted April 30, 1996
Decided Aug. 7, 1996

PER CURIAM.

The legal isues presented in this case are, by Shaper's own admission, the same legal issues previously litigated by the parties in Shaper's declaratory judgment action. In Grava v. Parkman Twp. (1995), 73 Ohio St.3d 379, 653 N.E.2d 226, syllabus, we held that "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." See, also, Superior's Brand Meats v. Lindley (1980), 62 Ohio St.2d 133, 16 O.O.3d 150, 403 N.E.2d 996.

Litigation of the legal issues raised by Shaper's refund claims is barred by res judicata in the instant case.

The decision of the BTA is affirmed.

Decision affirmed.

MOYER, C.J., and DOUGLAS, RESNICK, FRANCIS E. SWEENEY, Sr., PFEIFER, COOK and SHERCK, JJ., concur.

JAMES R. SHERCK, J., of the Sixth Appellate District, sitting for STRATTON, J.

APPENDIX C

[Jan. 20, 1995]

OHIO BOARD OF TAX APPEALS

Case No. 93-X-1032
(Personal Income Tax)

SERENE G. SHAPER,
Appellant,

vs.

ROGER W. TRACY,
Tax Commissioner of Ohio,
Appellee.

DECISION AND ORDER

The Board of Tax Appeals considers this matter upon the appellant's September 7, 1993 Notice of Appeal. Appellant is appealing from an August 6, 1993 journal entry which denied appellant's class action refund claim. The claim related to personal income tax payments for tax years 1988, 1989, 1990 and 1991.

The appellant claims to be the owner of securities of a state or political subdivisions thereof, other than this state and its subdivisions and authorities, during the tax years in question, and claims payment of income tax on the interest earned on such securities, pursuant to R.C. 5747.01(A)(1). R.C. 5747.01(A)(1) includes as taxable income, interest generated by non-Ohio state and municipal securities. However, it exempts from taxable income, interest earned upon Ohio state and municipal securities. This differential treatment of income earned on such securities is at the heart of appellant's appeal.[1]

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[1] Appellant cites as her authority *Chemical Waste Management, Inc.* v. *Hunt* (1992), 504 U.S. ——, 112 S. Ct. 2009, 119 L. Ed.2d

Appellant appeals with three specifications of error. First, appellant contends R.C. 5747.01(A)(1) violates the Commerce Clause of the United States Constitution. Secondly, appellant contends the Tax Commissioner erred in ruling that her claim could not be brought as a class action. Thirdly, the appellant asserts her failure to submit separate factual evidence documenting her bond income should not affect the disposition of the purely legal claims.

The appellee Tax Commissioner determined the Revised Code does not contain a mechanism for a class action income tax refund claim. The Commisioner wrote:

> "* * *
>
> "Identification of each member of the class 'similarly situated' to the applicant would be a near impossibility, and the confidentiality of each taxpayer's tax information required by R.C. 5747.18 would be jeopardized through the forced inclusion into a class action refund claim and potential representation by someone not selected by the individual taxpayer. * * *
>
> "* * * *"
>
> (ST. 23)

The Commissioner also found the appellant failed to provide information substantiating her Commerce Clause claim.

We consider this cause and matter upon the appellant's notice of appeal, the stipulation of facts submitted jointly by the parties, the transcript certified to the board by the

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121, and *New Energy Co. of Indiana* v. *Limbach* (1988), 486 U.S. 269, 108 S. Ct. 1803, 100 L. Ed. 2d 302, for the proposition that just as a state may not tax incoming toxic waste or ethanol either exclusively or more heavily than that produced domestically, it is identically unacceptable to tax incoming municipal bond income more heavily than that generated on Ohio bonds.

Tax Commissioner, and the written legal arguments and additional authority submitted by the parties.

The stipulation of facts and the notifications of additional authority relate to the somewhat complicated civil proceedings concerning the same issues now before this Board. The appellant is concurrently pursuing a cause of action in the state courts. Most recently, the Franklin County Court of Appeals, in *Shaper* v. *Tracy, Tax Commissioner* (Sept. 2, 1994), Franklin App. No. 94APE-0132, unreported, affirmed summary judgment entered by the Common Pleas Court. In the trial court, Judge Stratton held that the Commerce Clause has not been applied to acts of a sovereign on behalf of itself [2] (as opposed to its citizenry), which provided the sovereign with a competitive advantage over another sovereign.[3]

The appellant appealed the Franklin County Court of Appeals decision to the Supreme Court of Ohio on November 16, 1994, and the appellee Commissioner cross-appealed on November 30, 1994. The case appears on the Ohio Supreme Court's docket as case number 94-2439. The case is currently pending a determination of jurisdiction, upon the allowance of a claimed appeal of right, or a discretionary appeal.

---

[2] J. Stratton noted Commerce Clause cases deal with a state involvement or protection of private enterprise that in some way favors a private entity within a state, over an out-of-state industry. Stratton wrote: " * * * neither the Supreme Court nor any case law examined has applied the Commerce Clause to actions between government entities. Each state has a legitimate interest in tapping a major source of tax revenue while adding an incentive for investors to purchase state bonds."

[3] In so finding, J. Stratton granted appellee Commissioner's Motion for Summary Judgment, and also found the following: the appellant may maintain an action in Common Pleas Court for declaratory relief, the appellant is not first required to exhaust her administrative remedies before seeking declaratory relief, and the appellant does not have the right to maintain a 42 U.S.C. sec. 1983 action in Ohio state courts.

Returning to the appeal before us, the appellant has aptly noted this Board is an administrative board, lacking the jurisdiction to determine the facial constitutionality of a statute. *S.S. KresgeCo* . v. *Bowers* (1960), 170 Ohio St. 405, paragraph one of the syllabus; *Herrick* v. *Kosydar* (1975), 44 Ohio St. 2d 128, 130; *Roosevelt Properties Co.* v. *Kinney* (1984), 12 Ohio St. 3d 7, 8; *Cleveland Gear Co.* v. *Limbach* (1988), 35 Ohio St. 3d 229, paragraph one of the syllabus.

In *Herrick, supra,* plaintiffs brought in Common Pleas Court, a class action on behalf of former state employees, seeking a declaratory judgment that two state tax statute amendments were unconstitutional. The Supreme Court held the Common Pleas Court did have jurisdiction to render a declaratory judgment, despite alternative administrative remedies provided by R.C. Title 57. The Court wrote:

> "* * * administrative proceedings in this case would be futile preludes to the assertion of plaintiffs' actual claim in a later appeal to the courts. Administrative proceedings could not provide or even consider the relief sought by these plaintiffs. * * *"

These observations are equally applicable in this case. As such, we defer ruling upon appellant's claim questioning the constitutional validity of R.C. 5747.01(A)(1), on the basis that this Board is without jurisdiction to make such a declaration.

We affirm the Tax Commissioner's finding that R.C. 5747.11 does not provide for class action refund claims. We affirm the Commissioner's finding that appellant has failed to provide any information substantiating her claim for refund for payment of tax upon income earned upon securities issued by states and subdivisions thereof, other than this state.

Therefore, it is the Decision of the Board of Tax Appeals that the journal entry of the Tax Commissioner should be, and hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.

/s/ Kiehner Johnson
KIEHNER JOHNSON
Chairman

APPENDIX D

[Aug. 6, 1993]

STATE OF OHIO
DEPARTMENT OF TAXATION

FINAL DETERMINATION

In re Refund Claim No. IT-6832

Serene G. Shaper
2630 South Green Road
University Heights, Ohio 44122-1536

Personal Income Tax
Tax Years: 1988, 1989, 1990 and 1991

This matter involves a claim under R.C. 5747.11 for refund of $6,001.86.

The applicant contends that she is seeking the subject refund claim as a member of a class consisting of herself and "all others similarly situated" and that she is challenging *Herrick* v. *Kosydar* (1975), 44 Ohio St. 2d 128 and its holding that "class refund claims are not allowable." The applicant further contends that pursuant to *Chemical Waste Management, Inc.* v. *Hunt* (1992), 504 U.S. ——, 119 L. Ed. 2d 121, 112 S. Ct. ——, R.C. 5747.01(A)(1) violates the Commerce Clause because it does not subject to Ohio personal income taxation interest generated by Ohio bonds, but does subject to such taxation interest generated by non-Ohio bonds. The applicant's contentions are not well taken.

The applicant's attempt to file a class action refund claim for the alleged illegal or erroneous payment of Ohio income taxes is not allowed. The controlling statute in the Ohio Revised Code providing for the refund pro-

cedure, i.e., R.C. 5747.11, does not allow for a class action refund claim. Identification of each member of the class "similarly situated" to the applicant would be a near impossibility, and the confidentiality of each taxpayer's tax information required by R.C. 5747.18 would be jeopardized through the forced inclusion into a class action refund claim and potential representation by someone not selected by the individual taxpayer. In essence, along with concerns for the potential of an administrative quagmire and a breach of confidentiality, the Ohio Revised Code does not contain a mechanism for a class action income tax refund claim. The applicant's refund application can only be considered as an application for the individually named taxpayer.

Further, while the applicant stated that she is challenging *Herrick* v. *Kosydar, supra,* for the proposition that class refund claims are not allowable, the issue in that case was whether the county common pleas court had jurisdiction to issue a declaratory judgment when an administrative remedy was available. The Court held that the common pleas court did have such jurisdiction. The only comment the Court made regarding refund claims and class actions was that considering that the class action in that case consisted of 40,000 claimants seeking refund of income taxes paid on a state pension or retirement allowances, "[a]dministrative remedies would require each of those claimants to file a separate refund application, a requirement which can hardly be considered an equally serviceable alternative to a single declaratory judgment action." *Id.* at 130, 131. While not the holding, this statement by the Court does offer support to the Department of Taxation's position that income tax refund claims must be made by the individual taxpayer.

The applicant's Commerce Clause contention is also without merit. *Chemical Waste Management, supra,* dealt with a hazardous waste disposal fee that was imposed by the State of Alabama on hazardous waste generated outside

Alabama but brought into the state for disposal at a commercial facility. The Supreme Court held that the legislation enacting the fee violated the Commerce Clause because it discriminated against out-of-state commerce, i.e., the legislation imposed a fee on hazardous waste from outside Alabama but did not impose the same fee on similar hazardous waste created in Alabama. A glaring lack of factual similarity exists between *Chemical Waste Management* and the instant case. Further, in *Chemical Waste Management* the Commerce Clause was violated because of legislation that was economic protectionism in the guise of environmental regulation. Economic protectionism does not exist here.

The Supreme Court has long held that when an individual state participates as a consumer or vendor in commerce, it is a market participant and not a market regulator and its actions are therefore exempt from Commerce Clause analysis, even if its actions incidentally result in economic advantages to the state's private sector. See *Hughes* v. *Alexandria Scrap Corp.* (1976), 426 U.S. 794; *Reeves, Inc.* v. *Stake* (1980), 447 U.S. 429; *White* v. *Massachusetts Council of Construction Employers, Inc.* (1983), 460 U.S. 204; and *South-Central Timber Development, Inc.* v. *Wunnickl* (1984), 467 U.S. 82. As a bond issuer, the State of Ohio is a market participant. As such, it is within its right to provide, as do approximately thirty-six states and the District of Columbia, an exemption for its own bonds that is not available for other states' bonds. The propriety of this right has been supported by the Supreme Court in *White* v. *Massachusetts Council of Construction Employers, Inc., supra*:

> The line between regulation and market participation, for purposes of the Commerce Clause, should be drawn with reference to the constitutional values giving rise to the market participant exemption itself. As the Court recognized in *Reeves,* the most impor-

> tant of these is that historically the "Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace"; it was not designated "to limit the ability of the States themselves to operate freely in the free market." *Reeves,* 447 U.S., at 437, 100 S. Ct., at 2277. The Court also observed that the distinction between participation and regulation rests on core notions of state sovereignty, coupled with the traditional right of private traders to determine the identities of their bargaining partners free from governmental interference. *Id.*, at 438-439, 100 S.Ct., at 2279. The legitimacy of a claim to the market participant exemption thus should turn primarily on whether a particular state action more closely resembles an attempt to impede trade among private parties, or an attempt, analogous to the accustomed right of merchants in the private sector, to govern the State's own economic conduct and to determine the parties with whom it will deal.
>
> *Id.* at 218.

Additionally, though additional information was requested three times from the applicant, she failed to provide any information substantiating her claim of a Commerce Clause violation by R.C. 5747.01(A)(1). Usually the party challenging a statute must prove discrimination and economic protectionism. *Hughes* v. *Oklahoma* (1979), 441 U.S., 322. The applicant has merely claimed in her application that a Commerce Clause violation exists, but has refused even to submit information that would allow the Department of Taxation to determine the source of income claimed by her to be non-Ohio income reported on line 25 and federal income reported on line 30 of the Ohio tax returns for each tax year at issue. Without the cooperation of the applicant and without her supporting her claims with substantive evidence, there is no alternative but to deny the refund claim.

Accordingly, the subject refund claim is denied.

THIS REFLECTS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THE SUBJECT MATTER. UPON THE EXPIRATION OF THE THIRTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILES APPROPRIATELY CLOSED.

/s/ Roger W. Tracy
ROGER W. TRACY
Tax Commissioner

APPENDIX E

THE SUPREME COURT OF OHIO
1995 TERM

To wit: March 1, 1995

Case No. 94-2439

SERENE G. SHAPER,
Appellant/Cross-Appellee,

v.

ROGER W. TRACY, Tax Commission Director of
Ohio Department of Revenue,
Appellee/Cross-Appellant.

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal and the cross-appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Benesch, Friedlander, Coplan & Aronoff.

COSTS:

Docket Fee, $40.00, paid by James Lawrence.

(Franklin County Court of Appeals; No. 94APE0132)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX F

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 94APE01-32
(Regular Calendar)

SERENE G. SHAPER,
Plaintiff-Appellant,

v.

ROGER W. TRACY, Tax Commission Director of Ohio Department of Revenue,
Defendant-Appellee.

OPINION
Rendered on September 29, 1994

APPEAL from the Franklin County Court of Common Pleas.

YOUNG, J.

This matter is before this court upon the appeal of Serene G. Shaper, appellant, from the December 7, 1993 judgment entry of the Franklin County Court of Common Pleas granting summary judgment in favor of Roger W. Tracy, Tax Commissioner of Ohio and Lee Fisher, Attorney Gereral of Ohio, appellees. The history of this case is as follows: appellant is an Ohio resident who owns municipal bonds issued by non-Ohio entities. Appellant filed this action seeking declaratory and injunctive relief, pursuant to R.C. 2721.02 and Section 1983, Title 42, U.S. Code. Appellant claims that R.C. 5747.01(A)(1) is discriminatory because it includes in adjusted gross income the "interest or dividends on obligations or securi-

ties of any state or any political subdivision or authority of any state," while exempting interest earned on bonds issued by Ohio and its subdivisions and authorities. Appellant sought to enjoin the appellee from assessing and collecting state income tax on interest earned by Ohio residents who owned bonds issued by governmental entities outside of the state of Ohio, and argued that Ohio's taxation scheme violated the Commerce Clause of the United States Constitution.[1] Appellant also moved for class certification and for summary judgment. Appellees moved for summary judgment, and argued that appellant could not maintain an action for declaratory and injunctive relief under Ohio law, because she was limited to the administrative refund claim procedure and was required to exhaust those remedies first. Appellees also argued that appellant was not entitled to relief pursuant to Section 1983, Title 42, U.S. Code and that R.C. 5747.01 (A)(1) did not violated the Commerce Clause.

The trial court found that Ohio law permits a party to challenge the constitutionality of a state tax provision via a declaratory judgment action, and that appellant was not required to first exhaust her administrative remedies. However, the trial court found that appellant was not entitled to maintain an action pursuant to Section 1983, Title 42, U.S. Code, when she had full and adequate state remedies. In addition, the trial court found that appellant was not entitled to injunctive relief unless and until the court determined that R.C. 5747.01(A)(1) was unconstitutional. The trial court held that R.C. 5747.01(A)(1) was not violative of the Commerce Clause for two reasons. Initially, the court noted that if the Commerce Clause were to apply, the market participant doctrine exempted Ohio's activity from Commerce Clause

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[1] The Commerce Clause provides: "[t]he Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" Article I, Section (8), Clause 3 of the United States Constitution.

scrutiny. Secondly, the court explained that the Commerce Clause had not been applied to acts of a sovereign on behalf of itself, (as opposed to its citizenry), which provided the sovereign with a competitive advantage over another sovereign. Accordingly, the trial court granted summary judgment in favor of appellees, and denied appellant's motion for summary judgment.

Appellant filed this appeal and asserts the following assignments of error:

> "The trial court erred in granting the state defendants' motions for summary judgment (Assignment of Error No. 1) and in denying plaintiff's motion for summary judgment (Assignment of Error No. 2)."

Appellant also presents the following issues for review:

> "1. Whether, in a declaratory action against state officials challenging a state tax provision asserted to violate the Commerce Clause on its face, the action may be maintained, as one of its counts, under 42 U.S.C. § 1983 (Assignments of Error Nos. 1 and 2).
>
> "2. Whether a state violates the Commerce Clause by its discriminatory income taxation of municipal bond interest on only the interest from bonds issued by non-Ohio issuers, while exempting interest earned on all bonds issued by Ohio entities (Assignments of Error Nos. 1 and 2).
>
> "3. Does the Commerce Clause of the United States Constitution prohibit states from discriminating in their own interests, by an income tax that explicitly taxes only the interest earned from other states' bonds?
>
> "4. Does the Commerce Clause not apply to state actions for their own fiscal benefit, in taxation schemes which intentionally discriminate against out-of-state bond issues?"

The instant action is before this court on an appeal from summary judgment. Summary judgment is proper when reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in its favor. Civ.R. 56(C). The parties agree that this case involves a question of law, rather than issues material fact.

Appellant challenges the constitutionality of R.C. 5747.01(A)(1) which taxes the interest on obligations issued by non-Ohio governmental entities, while exempting any interest earned on obligations issued by Ohio governmental entities. R.C. 5747.01(A) provides in pertinent part:

> " 'Adjusted gross income' means adjusted gross income as defined and used in the Internal Revenue Code, adjusted as follows:
>
> "(1) Add interest or dividends on obligations or securities of any state or of any political subdivision or authority of any state, other than this state and its subdivision and authorities[.]"

The trial court found that R.C. 5747.01(A)(1) was constitutional and did not violate the Commerce Clause for two reasons. Initially, the court found that the state of Ohio acts as a market participant when it issues bonds. The market participant doctrine recognizes that when a sovereign acts as a consumer or vendor in commerce, its actions as a market participant are distinct from its actions as a market regulator. The Commerce Clause is directed at the state's actions as a market regulator, therefore, actions as a market participant are exempt from Commerce Clause analysis. Clearly, when a state chooses to sell bonds and enter into the securities market, it is acting as a market participant. However, when a

state chooses to tax its citizens, it is acting as a market regulator. As stated by the United States Supreme Court:

> "The market-participant doctrine has no application here. The Ohio action ultimately at issue is neither its purchase nor its sale of ethanol, but its assessment and computation of taxes—a primeval governmental activity. To be sure, the tax credit scheme has the purpose and effect of subsidizing a particular industry, as do many dispositions of the tax laws. That does not transform it into a form of state participation in the free market. * * *" *New Energy Company of Indiana v. Limbach* (1988), 108 S.Ct. 1803, 1809.

Thus, we find that the market participation doctrine has no application to the instant action, as the state of Ohio is acting as a market regulator in its assessments of taxes.

However, we do agree with the trial court's conclusion that neither the Supreme Court, nor any case law examined, has applied the Commerce Clause to a case such as this, where one governmental entity is taxing its residents for the interest earned on bonds issued by another governmental entity. The trial court found that much of the Commerce Clause case law developed thus far, involved taxation schemes that benefitted a private industry or business in the state, to the detriment of out-of-state businesses. Accordingly, the trial court found that the Commerce Clause was simply never intended to apply to acts of a sovereign on behalf *of itself* where the end result is to provide the taxing state with a competitive advantage over *another* sovereign. Because the court found that the Commerce Clause did not apply to such a scenario, it found that R.C. 5747.01(A)(1) was not unconstitutional.

A review of the case law developed by the United States Supreme Court demonstrates that the Commerce Clause has been directed at acts of a sovereign on behalf

of its citizenry to improperly provide *its citizenry* with a competitive advantage over the *citizenry* of other states. The parties herein, have provided this court with numerous Commerce Clause cases, whereby taxation schemes were challenged when a state's taxation scheme discriminates against out-of-state businesses or entities. See *Dominion National Bank v. Olsen* (6th Cir. 1985), 771 F.2d 108; *Boston Stock Exchange v. State Tax Commission* (1977), 429 U.S. 318, 97 S.Ct. 599; *Madden v. Commonwealth of Kentucky* (1940), 309 U.S. 83, 60 S.Ct. 406. None of the cases cited are directly on point. The instant action does not involve a taxation scheme whereby the citizenry of Ohio are provided with a competitive adavntage over the citizenry of other states. Rather, the taxation scheme in the instant action benefits the state of Ohio itself.

Appellant is challenging Ohio's taxation scheme because Ohio includes, as adjusted gross income, interest income appellant earns from the bonds of other states. This court, after extensive research, has only been able to locate one case that is factually close, although the tax in question was not challenged on Commerce Clause grounds. In *Bonaparte v. Tax Court* (1881), 104 U.S. 592, the Supreme Court stated that "[t]he Constitution does not prohibit a State from including in the taxable property of her citizens so much of the registered public debt of another State as they respectively hold, although the debtor State may exempt it from taxation or actually tax it." *Id.* at syllabus. In *Bonaparte*, the taxpayer argued that, because the debtor state exempted its bonds from taxation, the taxpayer's resident state was required to exempt the bonds pursuant to the full faith and credit clause. The Supreme Court rejected this argument and stated: "[i]t is true, if a State could protect its securities from taxation everywhere, it might succeed in borrowing money * * * but, * * * it cannot secure such exemption outside of its own jurisdiction * * *." *Id.* at 595. In writing for the majority, Chief Justice Waite stated:

"[w]e know of no provision of the Constitution of the United States which prohibits such taxation." *Id.* at 594.

In other cases cited by the parties, the relationship between a state and the federal government was crucial to the court's analysis. *Davis v. Michigan Dept. of Treasury* (1989), 489 U.S. 803, 109 S.Ct. 1500; *Memphis Bank & Trust Co. v. Garner* (1983), 459 U.S. 392, 103 S.Ct. 692. These cases balance a state's interest against the *federal* government's interest. Thus, questions concerning states' rights and the Tenth Amendment are often implicated. As a result, these cases are not directly on point, as the case before us involves the relationship between Ohio and other *states.* However, we find the case of *South Carolina v. Baker* (1988), 45 U.S. 505, somewhat helpful to our analysis. In that case, the Supreme Court held that state bond interest was not immune from nondiscriminatory federal tax. (Overruling *Pollock v. Farmers' Loan & Trust Co.* (1895), 157 U.S. 429, 15 S.Ct. 673.) The court stated as follows:

> "* * * *The owners of state bonds have no constitutional entitlement not to pay taxes on income they earn from the bonds* and States have no constitutional entitlement to issue bonds paying lower interest rates than other issuers. * * *" *Id.* at paragraph two of the syllabus. (Emphasis added.)

It must be noted that the tax on the state bond interest in *South Carolina v. Baker* was not challenged on Commerce Clause grounds.

We agree with the trial court's rationale that "neither the Supreme Court nor any case law examined has applied the Commerce Clause to actions between government entities. Each state has a legitimate interest in tapping a major source of tax revenue while adding an incentive for investors to purchase state bonds. Those purchasers then become the major beneficiaries of the issuance of the bonds for state issues, capital improvements, and similar benefits." Given the lack of any prece-

dent to apply the Commerce Clause to this type of taxation scheme, we are unable to find R.C. 5747.01 unconstitutional as violative of the Commerce Clause.

The next issue we must address is whether or not the trial court erred in finding that appellant does not have the right to maintain a Section 1983, Title 42, U.S.Code action in Ohio courts to challenge an alleged unconstitutional tax provision. The trial court found that appellant could not maintain a Section 1983, Title 42, U.S. Code challenge to the statute, because state remedies offer her full and adequate relief. On appeal, appellant argues that her state remedies do not provide full and adequate relief.

Initially we note that Commerce Clause violations are cognizable under Section 1983, Title 42, U.S.Code. *Dennis v. Higgins* (1991), 111 S.Ct. 865. The type of relief sought, however, is critical to our analysis. To the extent that appellant seeks monetary damages, her Section 1983, Title 42, U.S.Code claim must fail. When sued for damages, state and state officials acting in their official capacities are not "persons" pursuant to Section 1983, Title 42, U.S.Code. *Will v. Michigan Department of State Police* (1989), 491 U.S. 58, 109 S.Ct. 2304. In a case where a party seeks injunctive, or prospective relief, a state official in his or her official capacity does qualify as a "person" for purposes of Section 1983, Title 42, U.S.Code. *Id.* at 71, 2312.

In a similar case, the Indiana Supreme Court held that the taxpayer had no cognizable claim under Section 1983, Title 42, U.S.Code for damages against the Department of State Revenue. In that case, the taxpayer alleged that an intangibles tax violated the Commerce Clause. The court held that there was no cognizable claim, because the state was acting in its official capacity in enacting and collecting the tax. *Indiana Dept. of State Revenue v. Felix* (Ind. 1991), 571 N.E.2d 287. The court further held that the taxpayer had no cognizable suit under

Section 1983, Title 42, U.S.Code for declaratory or injunctive relief, as the tax did not violate the Commerce Clause. *Id.* at 295. As stated by the Supreme Court of Indiana: "* * * [e]ven if the tax had not been repealed, our determination that the tax is constitutional would have resolved any claim for such relief. Plaintiffs have no cognizable suit for relief under § 1983." *Id.* at 295.

We find the above rationale pertinent to the instant action. Because we have no precedent to apply the Commerce Clause, and have upheld the taxation statute in question, any claim that appellant may have pursuant to Section 1983, Title 42, U.S.Code is moot.

We would also note that appellant has asked for a class action in this case, and that the trial court did not rule upon this request. As stated in *Aronson v. Commonwealth* (Mass. 1987), 516 N.E.2d 137:

> "* * * It is one thing to tolerate, outside normal administrative procedures, an action for declaratory relief * * * [w]here, however, an attempt is made to obtain refunds of substantial amounts of money on behalf of numerous unidentified taxpayers, the procedures of the administrative process should not be bypassed. Tax collectors and other public officials are entitled to know what portion of collected revenues is subject to challenge and are entitled to insist on adherence to fixed schedules for timely applications for abatement and for other steps in the administrative process. We find unacceptable such an open-ended contingent liability based on an action for declaratory relief. A class should not be certified in actions of this character." *Id.* at 144.

We find the reasoning in *Aronson* persuasive. However, we also find that the issue of class certification is moot, because appellant is not entitled to relief. As stated by the court in *Indiana Department of State Revenue v. Felix, supra*: "[i]nasmuch as the Clerks have lost their case on the merits, their contention of error con-

cerning their role as representatives of class members similarly situated is moot." *Id.* at 296.

Accordingly, appellant's assignment of error, and issues for review, are overruled and the Franklin County Court of Common Pleas entering summary judgment in favor of appellees is hereby affirmed.

Judgment affirmed.

BRYANT and MAHONEY, JJ., concur.

MAHONEY, J., retired, of the Ninth Appellate District, assigned to active duty under the authority of Section 6(C), Article IV, Ohio Constitution.

BRYANT, J., concurring.

Concurring in the majority's analysis of appellant's contentions under the Commerce Clause, and the majority's determination that its conclusion under the Commerce Clause renders her arguments under Section 1983, Title 42, U.S.Code moot, I thus concur in the majority's holding that the judgment of the trial court is affirmed.

APPENDIX G

[Filed Sep. 29, 1994]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLANT DISTRICT

No. 94APE01-32
(Regular Calendar)

SERENE G. SHAPER,
Plaintiff-Appellant,

v.

ROGER W. TRACY, Tax Commission Director of
Ohio Department of Revenue,
Defendant-Appellee.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on September 29, 1994, the assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

YOUNG, BRYANT
& MAHONEY, JJ.

By /s/ John C. Young
JUDGE JOHN C. YOUNG

MOHONEY, J., retired, of the Ninth Appellate District, assigned to active duty under the authority of Section 6(C), Article IV, Ohio Constitution.

APPENDIX H

[Filed Nov. 12, 1993]

COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Case No. 93CVH-11-9271
Judge Evelyn J. Stratton

SERENE G. SHAPER,
Plaintiff,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,
Defendant.

DECISION

Rendered this ——— day of November, 1993.

STRATTON, E.

This matter is before the Court on Cross-Motions for Summary Judgment filed by all parties. All parties agree that there are no issues of fact and that the decision of this Court rests purely on the law. The Court has reviewed all the numerous responses and replies, including Plaintiff's Post-Argument Brief and Defendant's Reply.

The issues are relatively straight-forward:

I. May the Plaintiff maintain an action for declaratory and injunctive relief?

II. Is Plaintiff required to exhaust her administrative remedies first?

III. Does Plaintiff have the right to a 42 U.S.C. § 1983 action?

IV. Does O.R.C. § 5747.01(A)(1) which taxes the interest income on obligations of non-Ohio obligations, while exempting such taxation of Ohio obligations, violative of the Commerce Clause of the United States Constitution?

I. MAY THE PLAINTIFF MAINTAIN AN ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF?

The Court finds that Plaintiff may maintain an action for declaratory relief. This issue has now been clearly resolved by the Ohio Supreme Court in *State ex rel. Tracy F. Franklin County Common Pleas Ct.*, No. 93-459, in which the Supreme Court declared that O.R.C. 2723.01 gives Common Pleas Courts such authority:

> § 2723.01 Jurisdiction of courts of common pleas.
>
> Courts of common pleas may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof, but no recovery shall be had unless the action is brought within one year after the taxes or assessments are collected.

However, the Supreme Court also found that the Common Pleas Court must first make a determination of illegality before granting any such injunction. Therefore, this Court must first reach the legal issues in the declaratory judgment action before addressing remedies.

II. IS PLAINTIFF REQUIRED TO EXHAUST HER ADMINISTRATIVE REMEDIES FIRST?

The Court finds that Plaintiff is not required to first exhaust her administrative remedies before seeking declaratory relief.

Plaintiff has filed for a refund with the Board of Tax Commissioners which has now reached a Final Determination in the Personal Income Tax Refund Claim No.

IT-6832 for tax years 1988-1991 filed by Serene G. Shaper. That Final Determination correctly states the Commissioner has no authority to deal with class actions. The Final Determination appears to go on to consider some of the constitutional claims, although the Tax Commissioner has no authority to declare such taxes illegal or unconstitutional. The Tax Commissioner rejected the refund claim and that case may now proceed to the Board of Tax Appeals and from there to the Supreme Court. Therefore, the Plaintiff is clearly pursuing administrative remedies concurrently.

However, the Court does not find such administrative remedies to be exclusive or exhausted and that Plaintiff is not required to conclude her administrative remedies to proceed with this action, particularly in a class action format.

O.R.C. 2723.01 implicitly gives the Common Pleas Court authority to find a taxing scheme illegal and the Supreme Court in *State ex rel. Tracy, supra*, has now so confirmed. The bottling industry in *Tracy* was not required to exhaust administrative remedies or pay the tax and seek refunds before seeking declaratory and injunctive relief.

In *Herrick v. Kosydar*, 44 Ohio St. 2d 128 (1975), the Supreme Court noted that administrative agencies are without jurisdiction to rule on the constitutionality of a statute and that forcing administrative exhausion first would only result in futile delays. The matter eventually would end up in the Supreme Court either route. Further, the Supreme Court held:

> Whatever may be the rule in other jurisdictions, it is settled in Ohio that an action for a declaratory judgment may be alternative to other remedies in those cases in which the court, in the exercise of sound discretion, finds that the action is within the spirit of the Uniform Declaratory Judgments Act, Gen. Code, § 12102-1 *et seq.*, that a real contro-

> versy between adverse parties exists which is justifiable in character, and that speedy relief is necessary to the preservation of rights which may be otherwise impaired or lost. [Citations omitted, p. 130.]

As to the inability of administrative remedies to deal with class actions, the Court held (Per Curiam):

> Further, the present action is a class action, brought on behalf of an estimated 40,000 claimants. Administrative remedies would require each of those claimants to file a separate refund application, a requirement which can hardly be considered an equally serviceable alternative to a single declaratory judgment action. A class action provides various other procedural benefits and safeguards, as set out in Civ. R. 23, and offers clear advantages for large groups of litigants with similar interests. None of these advantages would be available in an administrative hearing, or in an appeal therefrom to the courts. [p. 130].

The Supreme Court found that a declaratory judgment action involving a large class seeking refunds of income taxes on state pensions to be "clearly a superior remedy for the Plaintiffs" (p. 130). Therefore, the Court finds that Plaintiff does not need ot exhaust her administrative remedies and may proceed forward with this action.

III. DOES THE PLAINTIFF HAVE A RIGHT TO MAINTAIN A 42 U.S.C. § 1983 ACTION IN OHIO STATE COURTS?

The Court finds that Plaintiff does not have the right to maintain a 42 U.S.C. § 1983 action in Ohio State Courts.

Federal case law has clearly prohibited parties from attacking state tax matters in Federal Court under the Tax Injunction Act of 1937, 28 U.S.C. § 1341, which provides:

> The district courts shall not enjoin suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be back in the courts of such state.

Fair Assessment in Real Estate v. McNary, (1981), 454 U.S. 100 broadened the application of the Tax Injunction Act finding that the financial stability of the States was best served by allowing state courts to deal with state remedies:

> Taxpayers must seek protection of their federal rights by *state remedies* provided, of course, that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this court. [p. 116]

The *Fair* Decision also expands the prohibition to federal monetary damages as well as injunctive relief.

The majority of state courts have held that § 1983 actions cannot be maintained in state courts either. This rationale is sound, and is not, as Plaintiff suggests, an attempt to shirk a state's responsibility to carefully examine the constitutionality of its own tax structure. But it defies rationale to expand state actions to include those challenges that are prohibited in federal courts, especially when state courts have adequate remedies to deal with the same issue.

One issue looked at by other jurisdictions ruling on § 1984 actions is the adequacy of speedy state remedies. In *Sunderland Properties, Inc. v. County of Berks*, (1990) 750 F. Supp. 704, the Pennsylvania Court noted that:

> A plaintiff's state remedy is plain, speedy and efficient if it provides the taxpayer with a full hearing and judicial determination at which the taxpayer may raise federal constitutional objections. *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 514 [101 S. Ct. 1221, 1229, 67 L. Ed. d 464] (1981).

> . . . The state remedy that will suffice need only be adequate, and need not be coextensive with the remedies in federal court. In other words, the state remedy that will meet the requirement of plain, speedy and efficient need not be the best or most convenient one. [p. 707]

In this case, Plaintiff is pursuing both an administrative appeal and declaratory relief in State. Both remedies, especially the Tax Court, are speedy, efficient and afford full and adequate due process protection to the Plaintiff. The Pennsylvania Court put well in *Greenwich Township v. Murtagh*, (1992) 144 Pa. Commw. 624, 601 A.2d 1352:

> We join the consensus of other state courts that a Section 1983 challenge to state tax administration is not maintainable if state remedies afford the taxpayer an opportunity for full and adequate relief. Both Congress, by enacting the Anti-Tax Injunction Act, and the Supreme Court, by its holding in *Fair Assessment,* prohibiting or declining to exercise jurisdiction, *have decided that federal interests are not advanced by allowing federal causes of action to intrude upon a carefully formulated state system designed to rectify state tax disputes.* Since federal courts decline to exercise jurisdiction because federal intrusion in state tax schemes is unwarranted, state courts should also not interfere, because its enforcement of Section 1983 is not less intrusive or disruptive than if enforced by a federal court. [Emphasis supplied, p. 1356]

The rationale is also well expressed in *North Dakota v. Quill Corporation*, upon rehearing, (May 11, 1993), Case No. 920283, 1993 N.D. Lexis 90, cert. denied on rehearing. The Court's conclusion summarizes this Court's Opinion succinctly (p. 15):

> A state might be forced to entertain in its own courts, suits from which it was immune in federal court.

Therefore, the Court finds that § 1983 actions for a tax challenge are not permissible in Ohio State Courts and that the Plaintiff possesses its full and fair remedies —a Tax Appeal and a Common Pleas Action—to challenge such tax structures.

IV. DOES O.R.C. § 5747.01(A)(A) WHICH TAXES INTEREST INCOME ON OBLIGATIONS OF NON-OHIO ISSUES WHILE EXEMPTING SUCH TAXATION OF OHIO OBLIGATIONS VIOLATIVE OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION?

The fourth issue and the heart of this case is whether the tax exempt status of Ohio issued bonds is illegal and/or unconstitutional, or in particular, violates the commerce Clause of the United States Constitution.

The Court, having carefully reviewed all of the well-researched arguments of all three counsel, and having heard oral argument on the same, finds it does not.

This issues appears to be one of first impression in Ohio.

On July 13, 1992, Plaintiff Serene G. Shaper, filed the above-captioned action in the Cuyahoga County Court of Common Pleas seeking relief pursuant to R.C. § 2721.03 that R.C. 5747.01(A)(1) be declared unconstitutional as in conflict with Article I, § 8, Cl. 3 of the Constitution of the United States, the Commerce Clause, and that the Defendant, Tax Commissioner, be enjoined from assessing and collecting state income tax, pursuant to said statute, "upon interest earned by Ohio residents upon bonds issued by governmental entities outside the State of Ohio."

Under Ohio Rev. Code Ann. § 5747.01(A)(1) (Baldwin 1991), "adjusted gross income" for purposes of Ohio income taxation includes:

> interest or dividends on obligations or securities of any state or any political subdivision of any state, other than this state and its subdivisions and authorities.

Plaintiff has purchased numerous out-of-state bonds, according to her tax returns. For example, in 1991, of $115,940.50 of reported Ohio taxable income, 26%, or $30,411.05 of income came from non-Ohio governmental obligations. Plaintiff has filed (and now been denied) a refund on the tax on those non-Ohio government obligations and concurrently filed this class action.

Shaper argues that R.C. 5747.01(A)(1) discriminates against interstate commerce by making Ohio's governmental obligations more marketable in Ohio, by virtue of their state tax exemption, than the obligations of other states. She argues that the sole purpose behind the provision is to accomplish just this result—economic protectionism. Defendants argue that the Commerce Clause does not apply to interstate commerce between sovereign entities and that nevertheless, this activity is exempt as a market participant rather than a market regulation.

The Court finds that although the "market participant" theory applies, the better rationale is that the Commerce Clause was never intended to govern transactions between government entities.

Plaintiff has been able to cite no case law that is directly on point. All of the cases, in some form or fashion, deal with the state's involvement or protection of private enterprise that in some way favors a private entity within a state over another industry out of state.

Plaintiff repeatedly tries to rely on *Boston Stock Exchange v. State Tax Commission,* (1977), 429 U.S. 318,

50 L. Ed. 2d 514. However, *Boston* fits into the same pattern of state protection of private enterprise. *Boston* involved an attempt by the State of New York, through its taxing powers, to provide a competitive edge to private business of the New York Stock Exchange, by imposing a higher tax on in-state transfers of securities resulting from out-of-state sales than those resulting from in-state sales, thus giving the New York Stock Exchange a competitive edge.

Noting that "The obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges," 50 L. Ed. 2d 525, the Supreme Court found the statute to violate the Commerce Clause. The Court's key finding, which distinguishes *Boston* from government entities, is:

> Among these is the fundamental principle that we find dispositive of the case now before us. No State may, consistent with the Commerce Clause, "impose a tax which discriminates against interstate commerce—*by providing a direct commercial advance to local business.*"
>
> The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that *favor local enterprises* at the *expense of out-of-state businesses* "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects. [Emphasis supplied, citations omitted.] 50 L. Ed. 2d 525.

The key difference is the protection of *local enterprise*. In *New Energy Co. of Indiana v. Limbach*, (1988) 486 U.S. 269, dealing with Ohio's tax credit for ethanol produced in Ohio or for states granting reciprocal credits, again protection of private enterprise was involved and the Court invalidated the scheme. The Court found at p. 277 that:

> "the tax credit scheme has the purpose and effect of subsidizing a particular industry."

The Court went further in *New Energy Co.* in discussing the "market participant" theory which has evolved from several previous Supreme Court Decisions. Under the doctrine developed from these decisions, known as the "market participation doctrine," the Court has recognized that when the sovereign acts as a consumer or vendor in commerce, its actions as a market participant are distinct from its actions as market regulator (to which the Commerce Clause is directed), and are therefore exempt from Commerce Clause analysis, even though the actions provide discriminatory economic advantages to the state's private businesses. See *Hughes v. Alexandria Scrap Corp.* (1976), 425 U.S. 794, 49 L. Ed. 2d 200; *Reeves, Inc. v. Stake* (1980), 447 U.S. 429, 65 L. Ed. 2d 244; *White v. Massachusetts Counsel of Construction Employers, Inc.* (1983), 460 U.S. 204, 75 L. Ed. 2d 1; *South Central Timber Development, Inc. v. V. Wunnickl* (1984), 467 U.S. 82, 81 L. Ed. 2d 71.

These four cases developed the market participant theory, but *New Energy Co.* summed it up well (p. 277):

> That doctrine differentiates between a State's acting in its distinctive governmental capacity, and a State's acting in the more general capacity of a market participant; only the former is subject to the limitations of the negative Commerce Clause. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806-810, 96 S.Ct. 2488, 2496-2498, 49 L.Ed.2d 220 (1976). *Thus, for example, when a State chooses to manufacture and sell cement, its business methods, including those that favor its residents, are of no greater constitutional concern than those of a private business. See Reeves, Inc. v. Stake*, 447 U.S. 429, 428-439, 100 S.Ct. 2271, 2278, 65 L.Ed. 2d 244 (1980). [Emphasis supplied.]

Or as *Carll v. S.C. Jobs-Economic Devel. Authority* (1985), 372 S.E. 2d 331 (Supr. Ct., S.C.) states (p. 338):

> As a market participant, the State has the same rights as all other market participants. A trader may buy from whom he please, sell to whom he pleases and conversely, refuse to do so for reasons sufficient to himself.

In *New Energy Co.*, the state tried to justify the granting of tax credits to Ohio ethanol producers as a "market participant." But the Court found that not to be so; Ohio did not act as a seller or supplier or business itself in the ethanol process; Ohio merely provided tax control, which because it was *not* a state business activity (market participant) and because it *did* favor private business over out-of-state business, the tax credit was found to violate the Commerce Clause.

But again, *New Energy Co.* is distinguishable because it did *not* deal with commerce between state sovereigns, but rather protection of private enterprise.

An analogy can be drawn that in exempting its own governmental obligations from state income tax, that Ohio is acting as a market participant, as a business, and therefore free to seek a competitive edge. This Court can find no case that prohibits such action.

The better rationale is that neither the Supreme Court nor any case law examined has applied the Commerce Clause to actions between governmental entities. Each state has a legitimate interest in tapping a major source of tax revenue while adding an incentive for investors to purchase state bonds. Those purchasers then become the major beneficiaries of the issuance of the bonds for state issues, capital improvements, and similar benefits. To remove such an inducement would reduce a state's ability to fund its own debts, obligations, and capital improvements.

Carried to its extreme, Plaintiff's position would decry the federal government's ability to issue tax-exempt securities. Why should the federal government enjoy any greater protection from income tax in funding its obligations than state governmental obligations? Would not its own exemptions violate the Commerce Clause as much as the State's?

In conclusion, whether one treats a state in issuing its own tax-exempt securities and taxing those of other state entities as a market participant issue, or whether the Commerce Clause was simply never intended to apply to such state actions for its *own* protection, not that of private businesses, the Court finds that the Commerce Clause does not apply, and O.R.C. 5747.091(A)(1) is not unconstitutional.

Because of the holding reached by this Court, there is no need to address the issues of class certification.

Therefore, Plaintiff's Motion For Summary Judgment is DENIED and Defendants Roger Tracy, Tax Commissioner and Lee Fisher, Ohio Attorney General's Motion for Summary Judgment are GRANTED. Counsel for Defendants shall prepare a Judgment Entry within 10 days. Costs to Plaintiff.

/s/ E. Stratton
JUDGE EVELYN STRATTON

APPENDIX I

[Filed Dec. 7, 1993]

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Case No. 92CVR-11-9271

JUDGE EVELYN J. STRATTON

SERENE G. SHAPER,
Plaintiff,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,
Defendant.

JUDGMENT ENTRY

This matter is before the Court on Cross-Motions for Summary Judgment filed by all parties. The Court, having reviewed the motions, briefs and oral arguments of the parties, agree with the parties that there are no genuine issues of fact material to the case and that the case rests purely on issues of law. The Court, having carefully considered these issues, holds, for the reasons more fully set forth in its Decision of November 12, 1993, incorporated herein by reference, as follows:

1. The Plaintiff, pursuant to R.C. § 2723.01, has the right to maintain an action for declaratory relief to contest the constitutionality of R.C. § 5747.01(A)(1).

2. The Plaintiff has no obligaiton to first exhaust her administrative remedies pursuant to Personal Income Tax Refund Claim No. IT-6832 for tax years 1988-1991, currently pending before the Board of Tax Appeals, in which she has raised the same constitutional claim.

3. The Plaintiff has no right to an injunction under R.C. § 2723.01 unless, and not until, this Court would make a determination of illegality.

4. The Plaintiff has no right to maintain a 42 U.S.C. § 1983 action to contest the constitutionality of R.C. § 5747.01(A)(1) when she has full and adequate state remedies to deal with the same issue.

5. R.C. § 5747.01(A)(1), which taxes interest and dividend income on non-Ohio governmental obligations held by Ohio taxpayers while exempting the interest and dividend income of Ohio governmental obligations held by Ohio taxpayers, is not violative of the Commerce Clause, Article I, § 8, Cl. 3, of the United States Constitution.

WHEREFORE, Plaintiff's Motion for Summary Judgment is hereby DENIED;

The Cross-Motions for Summary Judgment of Defendants Roger W. Tracy, Tax Commissioner of Ohio, and Lee Fisher, Ohio Attorney General, are hereby GRANTED;

Costs are assessed to the Plaintiff.

JUDGE EVELYN J. STRATTON

APPROVED:

CLINTON A. KRISLOV
Attorney for Plaintiff

/s/ Andrew Bergman
ANDREW BERGMAN
Attorney for Defendant Lee Fisher

/s/ Lawrence D. Pratt
LAWRENCE D. PRATT
Attorney for Defendant Roger W. Tracy

APPENDIX J

Excerpt from Transcript of Proceedings

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Case No. 92CVH-11-9271

SERENE G. SHAPER,

Plaintiff,

vs.

ROGER W. TRACY, *et rel.* Tax Commissioner of Ohio, and LEE FISHER, Attorney General of the State of Ohio,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Before Judge, Evelyn Stratton, on Monday afternoon, September 13, 1993.

* * * *

[55] THE COURT: You are saying here because actually selling something, selling bonds and stocks and whatever, else, bonds and securities that is the private industry they're engaging in?

MR. PRATT: Absolutely, just like they were selling cement in one of the other market participant cases that the Supreme Court addressed.

The doctrine applies both to, the sale and purchase of goods. And as long as the state is on one side and acting more like a private participant than as a state. They

cite doctrine of loss. Once again, if the state is merely marketing its bonds more successfully by creating certain advantages to consumers of this to bonds, it's acting as a market participant.

That's what we would suggest the court find. If the court does not initially find—again, this is our first premise, that the clause doesn't apply to all. To this situation both on its case by its interpretation. If we get past those two stages, then we need to address the next issue, which is whether or not it's economic protectionism.

And the case law on that issue is specifically—and states that the whether a statute is a protection activity [56] measure, whether it is can be fairly viewed as a law treated to a legitimate local concerns is the test that the court must look at.

The case law also suggested that the burden is on the plaintiff to establish that there is protectionism involved. We don't think the plaintiff has met that burden in the instant case.

There hasn't been any facts presented to court on behalf of the plaintiff that would even remotely address themselves to that particular concern. All we have is a very generic, unconfirmed opinion of the plaintiff that it might be the case, no facts to establish it whatsoever.

THE COURT: But it seems pretty obvious somebody has to pay for tax, then we buy out of state.

MR. PRATT: But the intent must be to create that result. And that hasn't been proven.

THE COURT: What other intent could be intended?

MR. PRATT: We have attached to our memorandum in opposition and in support of our own motion for summary judgment an affidavit. That affidavit contains factual information from one of the individuals who was responsible in drafting and creation of the particular statute at issue, an individual testified extensively before the general assembly as to the pros and cons of the [59] Boston Stock Exchange case look at a couple of key factors of factual nature in each of those two decisions

in reaching their ultimate conclusion that a violation in both cases. It was virtually stipulated on the record by both parties that the only purpose behind the measure was to—for economic protectionism.

It was expressly found to be a factual determination by the court in each of those two decisions. And there was also another circumstance that was looked at as an implied proof that there wasn't any other purpose behind the measure.

In each case it was noted by the court that there wasn't any significant revenue derived from the state as a result of the measure in issue.

As the court has already indicated, that's not the case here. We're talking about $20 million a year in annual revenue to the state of Ohio. Although Mr. Krislov may not know—the court is well aware, we're going through very tough economic times in Ohio.

And I would submit to the court that the State of Ohio would not likely throw away $20 million when it's trying to balance its budget.

There is a significant purpose behind this measure. It would create substantial financial harm to the State of Ohio if it was struck down. That, to me, goes straight [60] towards the argument that there was no other reason behind this measure than to somehow create an economic protectionism facet for the state's bonds.

I would submit to the court further that to the extent that if there is a disparity involved here, it's a disparity that's entirely consistent with the sound policy of this state. If, in fact, it stirs the market behind Ohio bonds in the State of Ohio, where better should that market be? It is the citizens of Ohio that are being benefitted by those Ohio bonds. Why shouldn't they be encouraged to purchase the bonds in their own state?

That is economic protectionism. That is the life blood of the sovereign itself. That is a government function. And I think that function falls well within the policy behind the measure. And I do not think that policy is inconsistent with the United States Commerce Clause.

I don't think in any way it favors the private business over other private business. I think it goes to the sound and fundamental operation of the sovereign themselves. I think that would be construed to be entirely consistent with the United States Constitution.

Based upon all of those factors, we don't think that the plaintiff has met its burden of establishing commerce clause violations.

* * * *

APPENDIX K

The Wall Street Journal
December 14, 1993 at C19

OHIO SUIT THREATENS TAX ADVANTAGES OF BUYING SINGLE-STATE MUNI FUNDS AND IN-STATE BONDS

By THOMAS T. VOGEL JR.
Staff Reporter of The Wall Street Journal

NEW YORK—Investors scrambling to buy municipal bonds or to invest in municipal-bond funds ahead of next year's big tax increase should take notice of a class-action lawsuit filed by a bondholder against the state of Ohio.

With the benchmark 30-year Treasury bond yielding 6.23% yesterday, up from 6.20% on Friday, many investors are looking to muni bonds for a boost. That's because they expect muni-bond yields, relative to Treasurys, to drop even further as the tax increase and a wave of bond calls in January spur demand.

But for investors in certain types of bonds and bond funds, the Ohio lawsuit may become a bitter pill. The suit, filed by Serene G. Shaper of University Heights, charges that the state in violating the U.S. Constitution by imposing its income tax on income from out-of-state municipal bonds. Most states tax the income of the tax-exempt bonds of other states.

Municipal-bond market experts are worried about the case even though a judge in the Franklin County Court of Common Pleas has already ruled against Ms. Shaper. Her attorney, Clint Krislov, says he plans to appeal the case and try to take it to the U.S. Supreme Court.

If he's successful, it would be bad news for the thriving $132 billion market for single-state municipal-bond funds. These funds, which specialize in buying the bonds of a single state, are designed to take adavntage of the extra

tax advantages for residents of those states if they buy in-state bonds. According to Lipper Analytical Services, there are 778 of these funds nationwide.

Oftentimes a bond from your own state will be exempt from federal, state and local taxes. But if Ms. Shaper prevails in her lawsuit in higher courts, such bond funds could lose this advantage. That's because a precedent would be set that could possibly force other states to lift taxes on out-of-state municipal bonds.

"This is something that will never be favorably ruled on at the state level," said Richard Lehmann, president of the Bond Investors Association. "It does have to go to the Supreme Court . . . and there are many reasons to think that the Supreme Court looks unfavorably on these situations." If the lawsuit were finally successful, said Mr. Lehmann, "there would be no point to single-state bond funds."

A ruling in favor of the suit could have a devastating effect on the value of single-state bond funds, said Mr. Lehmann. But appealing the ruling in Franklin County and taking the case to the U.S. Supreme Court "could take a while," Mr. Krislov said.

Such taxing practices, argued Mr. Lehmann, "give some states a certain advantage in the municipal-bond market at the expense of other states." States with low taxes and a small population, for example, see the demand for their bonds weakened when larger states with higher taxes levy taxes on the income from the smaller states' bond issues. A legal precedent that prevented states from taxing the income from municipal bonds of other states could help boost demand for such low tax states, said Mr. Lehmann. "It may be good for the municipal market," he added, "because it could improve the market's liquidity."

The suit, which was filed last year in the Cuyahoga County Court of Common Pleas, argues that Ohio's prac-

tice of taxing out-of-state municipal bonds is an "unambiguous discrimination against interstate commerce, solely a protectionist measure that cannot withstand scrutiny under the Commerce Clause" of the U.S. Constitution. The suit names Roger W. Tracy, director of the Ohio Department of Revenue, as the defendant.

In her decision last month, Judge Evelyn J. Stratton of the Court of Common Pleas in Franklin County ruled that "the Commerce Clause does not apply" to this particular case. Her decision said that "neither the Supreme Court nor any case law examined has applied to the Commerce Clause to actions between government entities."

Mr. Krislov said he expected such a decision. "We always knew from the beginning that this case would have to get to the Supreme Court," he said, "because no state is going to voluntarily surrender its ability to tax out-of-state bonds."

Meanwhile yesterday, Treasury securities posted moderate losses during light trading in response to a jump in precious-metals prices. For much of the session, the February gold futures contract was up more than $4 an ounce, flirting with $390. A rise in gold prices is often taken as a sign of growing inflation, which reduces the value of investments with a fixed rate of return. But a drop in the prices of other commodities, such as oil, helped ease inflation concerns.

Meanwhile, yesterday the U.S. Treasury also sold $26.15 billion of three-month and six-month bills at its regular weekly auction. The three-month bill was sold at an average discount rate of 3.06% for a coupon-equivalent yield of 3.12%. The six-month bill was sold at an average discount rate of 3.26% for a coupon-equivalent yield of 3.36%.

* * * *

APPENDIX L

The Bond Buyer
September 9, 1993 at page 1, column 3

OHIO'S TAX ON OUT-OF-STATE BONDS SPURS SUIT THAT WORRIES INDUSTRY

By Karen Pierog

CHICAGO—A lawsuit charging that Ohio is violating the U.S. Constitution by taxing income on out-of-state municipal bonds could seriously affect the municipal market, industry observers said yesterday.

The class action suit, which was filed last year by a bondholder in a Cleveland suburb, claims that Ohio, which exempts its own bonds from its income tax, is violating the commerce clause of the Constitution with its tax.

Specifically, the suit charges that "the imposition of state income tax upon interest paid by non-Ohio governmental entities is an unreasonable burden on interstate commerce and is nothing more than a protectionist measure that cannot withstand scrutiny under the commerce clause of the United States Constitution."

Last month Franklin County Common Pleas Court Judge Evelyn J. Stratton ruled in Ohio's favor, saying the commerce clause "was never intended to govern transactions between government entities."

However, Clint Krislov, a Chicago attorney representing Serene G. Shaper, the bondholder, said the decision will be appealed to the Ohio Court of Appeals and that he expects to take the case all the way to the U.S. Supreme Court.

"There is no question in my mind that the court will hold that state bonds are instruments of commerce," Krislov said.

He contended that states are participating in a market when they issue bonds and that states that tax income on other states' bonds are using their taxing power to "discriminate in interstate commerce."

Currently, 42 states collect income taxes on out-of-state bonds, while exempting all or some of their own bonds from taxation.

Municipal industry observers said the success of such a lawsuit in the U.S. Supreme Court would have implications for mutual funds that offer single-state funds and for the market as a whole, which would both lose the advantages of double tax-exemption on bonds. In addition, states that levy an income tax on out-of-state bonds could lose millions of dollars of annual revenues.

Richard Lehmann, president of the Bond Investors Association, said that if the suit prevails, "there would be a major, major change in the municipal market."

"All the state funds that were created as tax shelters would all be pointless." Lehmann said, "It would also mean that every municipal bond would be marketable in every state because of equal tax treatment, and that would tremendously liquefy the municipal market because everyone would be in the market for every bond."

On the other hand, Lehmann said some issuers, such as New York City, would see their cost of issuance "skyrocket" because the benefit of double tax exemption would be gone for buyers in the city, and those buyers could put their money in "safer paper."

Richard Ciccarone, a senior vice president and director of tax-exempt fixed-income research at Kemper Securities Inc., agreed that a favorable decision in the case "would throw the specialty state market in disarray."

"The disruption in the market would be substantial, victimizing buyers of in-state paper who were willing to accept lower interest rates because of the double tax exemption and now have concentrated risk," Ciccarone said.

Andrew Jennings, manager of the municipal trading desk at Franklin Advisors Inc., said the impact on single-state funds would depend on whether the high court would rule retroactively or prospectively.

Heather Ruth, president of the Public Securities Association, said while the group has no position on the matter, its policy has been to let states decide how to tax interest on their bonds or the bonds of other states.

"If for any reason the tax liability would be removed on outstanding bonds, it would raise the value of the bonds commensurately," Ruth said.

Krislov said the Ohio case is supported by recent Supreme Court decisions that struck down the higher taxes states were charging on materials such as toxic waste from other states.

"You can't tax incoming toxic waste more heavily than in-state toxic waste," Krislov said. "And you can't treat the bonds of a sister state as if they were an incoming Scud [missile] either."

Krislov said he might file similar cases in other states, but declined to name the states.

The momentum in the Supreme Court "seems to be in the direction of a kind of seamless economy," Lehmann said, which could help the Ohio case.

The case also has a supporter in James F. Blumstein, a law professor at the Vanderbilt Law School, who addressed the matter of state taxation of municipal bonds in an article written in 1978.

"The argument that this is purely a government thing is ridiculous," Blumstein said. "This is an industry—not just a government—issuing bonds."

Moreover, the system of double tax exemption in some states actually leads to higher bond yields for some issuers whose bonds are marketed out of state and must have yields that will attract investors who will have to pay their states' income tax on the bonds, Blumstein said.

Lawrence Pratt, Ohio's assistant attorney general who represented the state, said he feels confident that the state will prevail. Judge Stratton "completely" accepted the state's argument that the commerce clause cannot be applied to a state marketing its own products, Pratt said.

Pratt said Ohio began taxing the income on out-of-state bonds in the 1970s and that the state collects about $20 million annually from taxing those bonds.

APPENDIX M

The Bond Buyer
March 22, 1995 at Page 1, Column 2

PROPOSED MINNESOTA BILL WOULD TAX INTEREST FROM STATE, LOCAL BONDS

By Cris Carmody

A Minnesota lawmaker has sparked jitters in the municipal market by introducing a bill to eliminate the tax exemption now extended to its state and local bonds.

The bill, introduced last week by Rep. Ann Rest, D-New Hope, would impose the state's income tax on the interest earned from all state and local bonds sold after July 1, 1995. Minnesota's income tax, which has a maximum rate of 8.5% would also apply to bonds sold in the secondary market after July 1, regardless of when the debt was initially issued.

If the bill were enacted, Minnesota would join five other states that tax interest income on most of their own bonds—Illinois, Iowa, Kansas, Oklahoma, and Wisconsin.

Some observers estimate that Minnesota could raise $3 million to $4 million annually if the measure becomes law.

Executives in the municipal bond industry were not pleased by the proposal.

"I don't think there's much to say other than I'm not happy about it," said Michael Brilley, senior vice president of Sit Investment Associates', which manages the Sit Minnesota Tax-Free Income Fund consisting solely of Minnesota state and local bonds. "It seems dumb to me," he said.

But a House legislative analyst defended the bill. Joel Michael said Rest and her co-sponsors proposed the tax change to head off liability now in the Ohio courts.

The plaintiff in that suit, Serene Shaper, alleges that Ohio violates the commerce clause of the U.S. Constitution when the state taxes income only on out-of-state bonds.

Shaper, however, lost at the trial court level and the Ohio Appeals Court ruled against her last September. The Ohio Supreme Court has declined to hear the case, and Shaper's lawyer, Clint Krislov, said he will ask the U.S. Supreme Court this spring to hear the case.

Minnesota lawmakers have grown cautious about the impact of litigation since January, when the U.S. Supreme Court ruled against the state in a case brought by bankers challenging a law that taxed some federal transactions but not state transactions. As a result, the state must pay $327 million to Cambridge State Bank and other plaintiff banks. "The way the Supreme Court has imposed remedies on the states, we envision two unpalatable alternatives [if Shaper succeeds]. We would either have to exempt the bond interest on out-of-state issues for all open tax years for everyone who files for an income tax refund, or we'd have to retroactively tax Minnesotans on existing bonds," said Michael.

He added lawmakers had two other concerns. Because most bondholders are higher-income citizens, lawmakers find the tax exemptions inequitable. And he said the sponsors worry that because the bonds carry an attractive interest rate to lure out-of-state buyers, Minnesotans who buy an un-taxed in-state bonds have an unfair advantage. And the higher interest rate, Michael said is detrimental to issuers.

Municipal officials disagree. "We're opposed to the bill because we're concerned about the impact on borrowing costs for cities," said Gary Carlson, director of inter-

governmental affairs for the Minnesota League of Cities. "It certainly would probably hurt smaller cities."

He noted that some bond lawyers told him they rewrote offering documents for pending issues over the weekend to make sure disclosure on the proposal was included.

Ironically, one of the first issues to be priced since the bill's introduction was a $115 million competitive offering from the state of Minnesota. The specter of taxability concerned some market observers, said the state's assistant commissioner of finance Peter Sansen.

Bear, Stearns &Co. won the issue yesterday and an official said the bill had no effect on the pricing. However, Sansen said some investors were worried because if the bill passed, the bonds would become taxable on the secondary market.

"I talked to some buyers of the bonds who were concerned about it. One major investor said he was not going to buy the bonds because of it," Sansen said.

Minnesota House officials said they're aware the measure is not popular among public financiers. "The local investment banking community is strongly opposed to it, because the existing double tax exemption makes it easy for them to sell municipal bonds locally," said Michael.

The Minnesota House Committee on Governmental Operations will hold a hearing on the bill tomorrow.

Prospects for enactment are unclear; the Democratic Farm Labor Party controls both the Minnesota House and Senate, but Gov. Anne Carlson is an Independent-Republican. Carlson's administration has not taken a position on the bill.

(2)

Supreme Court, U.S.
FILED
JAN 29 1996
CLERK

No. 96-1046

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

SERENE G. SHAPER,
Petitioner,
v.
ROGER W. TRACY,
Tax Commissioner of Ohio,
Respondent.

On Petition for a Writ Of Certiorari to the
Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

For the most part, Respondent agrees with Petitioner's Statement of the Case. A few particulars however, merit comment. One, Petitioner mischaracterizes the parallel declaratory judgment action that she filed challenging the Ohio statutes. She claims that the prior action related only to future tax years, while this refund action related to prior tax years. Pet. pages 4-5. In the words of the Supreme Court of Ohio "[t]he tax years at issue in both appeals are the same." *Shaper v. Tracy*, 76 Ohio St. 3d 241, 242 (1996).[1]

Two, in attempting to bolster her due process claim, Petitioner asserts that the State requested the Ohio Supreme Court "to defer action on the declaratory action in favor of ruling in the refund track appeal." Pet. at 7. That is not true and nowhere appears in the record.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

There are three reasons why the writ should be denied. First, no federal question is presented. The decision of the Ohio Supreme Court is unmistakably based on the independent state law ground of res judicata. Pet. App. B at 2a. (Relying on two Ohio Supreme Court decisions, the Court held that "[l]itigation of the legal issues raised by

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[1]It is worth pointing out that the Petition omits the factual recitations of the Ohio Supreme Court's opinion, including this particular fact. Compare Pet. App. B at 2a with 76 Ohio St. 3d at 242.

Shaper's refund claims is barred by res judicata in the instant case.").

Second, the Ohio Supreme Court properly barred Petitioner from splitting her claims. "[T]he tax years at issue in both appeals are the same." 76 Ohio St. 3d at 242. And the prior declaratory judgment action decided the same issue presented here that the Commerce Clause does not preclude Ohio's taxation of Shaper's out of state bond interest. *Shaper v. Tracy*, 97 Ohio App. 3d 760 (1994), *app. denied*, 71 Ohio St. 3d 1477 (1995). That issue also has previously been presented to this Court, which denied Petitioner's attempt to obtain review of the Commerce Clause issue after she lost the declaratory judgment action in state court. *See Shaper v. Tracy*, __ U.S. __, 116 S. Ct. 274 (1995).

Third, contrary to Petitioner's suggestion, there is no substantial federal question presented by this case. The claim seeks to undo the settled practice of a significant majority of states that allows taxation of the interest from out of state bonds, while simultaneously exempting the interest from in state bonds. It also seeks to undo settled precedent that an investor in out of state bonds may not force the investor's state of domicile to forgo taxation of such interest. *Bonaparte v. Tax Court*, 104 U.S. 592 (1881). And it seeks to undermine the market participation doctrine. *See Reeves v. Stake*, 447 U.S. 429 (1980).

II. THE LOWER COURT DECISION RESTS ON AN INDEPENDENT AND ADEQUATE STATE GROUND.

A state court decision, premised on the law of res judicata of that state, contains an independent and adequate state ground for decision. *See Durley v. Mayo*, 351 U.S.

277 (1956); *see also Michigan v. Long*, 463 U.S. 1032 (1983). Nor is *Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984), to the contrary. In that case, the Ohio Supreme Court relied on *federal* rules of issue preclusion. "Collateral estoppel, therefore, was applied as a matter of federal, not state, law." 466 U.S. at 361. In contrast, Ohio law of res judicata was applied in this case because of a prior state court holding rejecting the very same claims and issues.

Shaper seeks to evade that reality by arguing that Ohio engaged in a "shell game." Pet. at 19-21. But the problem here is one of Shaper's making. She exposed herself to the potential for a res judicata (or collateral estoppel) claim by bringing two claims rather than just one. Having sought two bites at the apple, she has no reason fairly to complain when a procedural device used to prevent claim splitting (res judicata) is turned against her.

This argument is also wrong as a matter of fact. Shaper asserts that Ohio argued in *Shaper I* that discretionary review of her initial declaratory judgment action should be declined in favor of this refund action, which carries an appeal as of right, and then argued that the refund action is barred because of the prior declaratory judgment action. In the very early stages of the declaratory judgment action, to be sure, Ohio did argue that a declaratory judgment should not be allowed due to the non-exhaustion of an available administrative remedy -- the refund action. But Ohio lost. The trial court denied Ohio's argument and allowed Shaper to proceed in both the refund and declaratory judgment actions. Pet. App. H, at 25-28. The issue was not raised by Ohio again.

Nor is there any support for Shaper's argument that the state law of res judicata should not apply. Shaper argues that different tax years were involved in the two cases, thus

trying to invoke the rule that res judicata does not normally apply to different tax liabilities. In the Ohio courts, Shaper self characterized the declaratory judgment action as relating to "future years," since she also sought an injunction. But the request for declaratory relief alone would have done the same thing. At any rate, res judicata "bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp*, 73 Ohio St. 3d 379 (1995), syllabus. Quite naturally, the declaratory judgment action could not be bifurcated into future years only, since it affected the same years that were involved in the refund action.

But even if different tax years were involved, collateral estoppel would still bar review. The legal issue sought to be presented was clearly presented in *Shaper I*. Once a party has fought out a matter in litigation with the other party, she cannot later renew that duel.

Nor is it relevant that the declaratory judgment process results in a discretionary appeal to the Ohio Supreme Court, while the refund procedure provides a direct appeal.

> The General Assembly, in enacting both a reassessment and a refund provision, provided alternative methods of appealing assessments. The legislature, though, did not intend to provide redundant methods of relitigation.

Superior's Brand Meats v. Lindley, 62 Ohio St. 2d 133, 136 (1980). Shaper elected to present the same question in alternate procedures at the same time. She thus undertook the risk -- now realized -- that the declaratory judgment might preclude the refund action.

Finally, there is no parallel to *Reich v. Collins*, 513 U.S. 106 (1994). Due process does not prohibit a state from utilizing res judicata (or collateral estoppel) to bar relitigation of previously decided claims and issues. And this case simply does not involve "efforts to thwart refunds which are legitimately owed." Pet. at 26. It just involves limiting the refund decision to one final process. In the last analysis, an independent and adequate state ground exists and certiorari should be denied on this basis alone.[2]

III. THE ALLEGED FEDERAL ISSUE IS NOT CERTWORTHY.

A. The Decision Below Does Not Conflict With Any Lower-Court Decisions Or Any Decisions Of This Court.

Even if Petitioner could overcome the existence of an adequate and independent state ground, she has not raised a certworthy federal question. Shaper does not even suggest that a lower-court conflict exists among the state courts on the issue presented. Indeed none does. In the more than one hundred years in which such legislation has existed, not one state court has found the scheme unconstitutional.

Nor, for that matter, has this Court ever indicated that the widely-accepted practice is unconstitutional. On the contrary, the Court in reviewing a similar legislative scheme adopted by the state of Maryland noted that "[w]e know of no provision of the Constitution of the United States which

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[2] It is unclear whether Shaper even presented the state courts with a federal due process claim to avoid res judicata, as opposed to a state law claim that application of res judicata would be unfair. The claim was never identified as "federal" and only the most casual references to "due process" were made below.

prohibits such taxation." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). Since then the Court has not altered this view by indicating that the Commerce Clause somehow limits a sovereign's authority to subsidize the raising of local capital in competition with its sister sovereigns. Pet. App. F at 18a-20a.

In the absence of any conflict concerning the validity of a statutory scheme in existence for more than a century, it is difficult to understand why the issue needs to be addressed now. Review of the issue certainly would not help the states. At least 37 states have legitimately relied on their previously unchallenged authority to tax out-of-state government obligations differently from in-state government obligations. Pet. at 8-9 n. 3. The significance of that reliance is difficult to overstate. Ohio's taxation of out-of-state bonds, for example, accounts for at least twenty million dollars ($20 million) in annual revenue. *See* Appendix at 1a.

Investors also rely heavily on this statutory scheme. As Shaper herself concedes, "there are literally trillions of dollars invested in in-state municipal bond funds and single-state municipal bond funds." Pet. at 9 n. 3.

Unable to point to a single decision from any jurisdiction to support an alleged "major uncertainty" among the states, Shaper is forced to rely exclusively on newspaper stories to support this point. However, the news articles fail on their own terms to advance the argument. At best, they confirm that this lawsuit has application to other states, hardly a unique circumstance. At worst, they confirm the widespread reliance that Ohio and other states have placed on the validity of this longstanding practice.

B. The Commerce Clause Does Not Prohibit The States From Taxing Interest On Out-of-State Government Securities Differently From Interest On In-State Government Securities.

The Ohio courts also correctly rejected the Commerce Clause claim -- in the earlier case. One failing in Shaper's argument is her assumption that state regulation of government participants in interstate commerce is subject to the same Commerce Clause scrutiny as state regulation of private participants in interstate commerce. As the lower court recognized (in the earlier case),

> A review of the case law developed by the United States Supreme Court demonstrates that the Commerce Clause has been directed at acts of a sovereign on behalf of its citizenry to improperly provide *its citizenry* with a competitive advantage over the *citizenry* of other states. . . . The instant action does not involve a taxation scheme whereby the citizenry of Ohio are provided with a competitive advantage over the citizenry of other states. Rather, the taxation scheme in the instant action benefits the state of Ohio itself. (citations omitted) (emphasis in original).

Pet. App. B at 6a-7a. *See Reeves*, 447 U.S. at 437 ("[T]he Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace.").

In arguing to the contrary, it is clear that Shaper argues too much. If adopted, Shaper's novel theory of

Commerce Clause discrimination would seemingly have equal application to differential taxation of Ohio municipal bonds relative to private bonds. That cannot be. Nothing in the text or underlying function of the Commerce Clause indicates that governmental bodies are compelled to compete with private business on the same terms in fulfilling the traditional governmental function of funding public works.

The "market participation doctrine" likewise protects this exemption. Under that doctrine, when the sovereign participates as a consumer or vendor in commerce, its proprietary actions as a market participant are exempt from Commerce Clause scrutiny. And that is so even though the sovereign's actions may provide economic advantages to some private businesses or individuals but not others. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, 447 U.S. 429*; *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983).

Nor does a state's establishment of certain parameters on the conditions of those bonds, i.e., tax exempt status, in any way alter this conclusion. Shaper is simply wrong that the "market participation doctrine" does not apply merely because the state has utilized a tax measure as an incentive to market the bonds. The State is still the seller and issuer of the bonds.

New Energy Company of Indiana v. Limbach, 486 U.S. 269 (1988), is not to the contrary. In *New Energy*, the Court merely rejected the argument that the enactment of a tax credit scheme, affecting *private* purchases and sales of ethanol, constituted the acts of a market participant. In *New Energy* the *only* participation of the sovereign in the affected market was the enactment of a tax measure. The state neither purchased nor sold ethanol, and thus was not a

market participant. That plainly is not the situation here where the government is the issuer and seller of the bonds.

"The central rationale" of the Commerce Clause "is to prohibit state or municipal laws . . . that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone, Inc. v. Clarkstown*, __ U.S. __, 114 S.Ct. 1677, 1682 (1994). At issue in this case is a state practice that has withstood the test of time (subsidy schemes like this one first appeared at least 100 years ago), that has been widely accepted (at least 36 other states have similar measures), that Congress has long stayed its hand in interfering with, and that has not led to the "jealousies and retaliatory measures" among the states that the clause was designed to prevent. The Commerce Clause simply is not violated by this well-accepted practice.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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January 29, 1997

COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Case No. 92CVH-11-9271
Judge Stratton

SERENE G. SHAPER,
Plaintiff,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,
Defendant.

AFFIDAVIT

STATE OF OHIO)
) :SS
COUNTY OF FRANKLIN)

I, Michael P. Sobul, being duly sworn, state that the following is true to the best of my knowledge and belief.

The Tax Analysis and Local Government Distributions Division (formerly the Research and Statistics Division) of the Ohio Department of Taxation houses the library and historical documents of the department. I am the Assistant Administrator of that division and have made the attached copies of the following documents stored there as official records:

1. A copy of the cover and first four pages of the Ohio Tax Study Commission Report 1967 to the 107th General Assembly.

2. An abstract from the Legislative Service Commission dated April 30, 1970, of the testimony by Dr. Frederick Stocker on March 17, 1970 to the House Ways and Means Committee.

3. A Memorandum dated December 16, 1992 from Dr. Frederick Stocker concerning his testimony in item 2.

In my capacity as Assistant Administrator, I also have access to and am responsible for working with the department's records of annual revenue derived and/or outstanding from state income tax. Accessing these records, I have determined that approximately twenty million dollars ($20,000,000.00) was derived and/or is outstanding from non-Ohio governmental obligation interest and dividends reported on Ohio income tax returns for year 1989.

Further, affiant sayeth naught.

/S/ Michael P. Sobul

Sworn to and subscribed in my presence this 17th day of December, 1992.

/S/ Lawrence D. Pratt
Notary Public

LAWRENCE DWIGHT PRATT,
Attorney-At-Law
NOTARY--STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.